ESSAYS

UPON

Several Subjects

IN

LAW,

Sciz.

JUS TERTII,
BENEFICIUM CEDENDARUM ACTIONUM,
VINCO VINCENTEM,
PRESCRIPTION.

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Advocat

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THE following little Pieces, Fruits of ſome Leiſure Hours, are expoſed with the ſame Indifference they were conceived. If they prove uſeful, the End is gain'd: If not, there's no great Harm done. No Man will grudge the Author the Satisfaction of a laudable Attempt: He ſhall grudge no Man the Privilege of Reading or Neglecting, of Approving or Condemning.

Jus Tertii.

WHEN a Man pleads any Point, in which he has no LEGAL INTEREST, *i. e.* from the gaining of which he can propoſe to himſelf no *juſt* or *reaſonable* Advantage, he is remov'd *perſonali objectione* from pleading ſuch Point. For the Law encourages no Man to ſtand in the Way of his Neighbour, unleſs his own Intereſt be at Stake.

This perſonal Objection is expreſs'd commonly by the Name of *JUS TERTII.* And the Poſition runs thus, "That it is *jus tertii* to found "upon any Alledgance which does not terminate "in the legal Intereſt of the Proponer, but of a "third Party." Which comes in plain *Engliſh* to this, "Sir, You are not pleading for your ſelf, but "for another". And this is the true Touch-ſtone to diſcover when the *Jus Tertii* is well or ill founded. If the Proponer can ſhow he has any *legal Intereſt*, any *juſt* Benefit or Advantage in making

the Alledgance, this perſonal Objection of *Jus Tertii can never lie againſt him.*

In the Application of this Doctrine, the greateſt Difficulty is in judging, *what is a legal Intereſt*; that every *accidental* or *occaſional* Benefit does not come up to a *legal Intereſt* is plain. As to this Matter, all Arguments drawn from poſſible Contingencies are cut off. A legal Intereſt muſt be ſomething fix'd; ſomewhat the Proponer is founded in Law to plead upon, and to be cut out of which, he can ſubſume upon as an Act of Injuſtice. This falls to be eſtimated and judg'd of, by the Situation the Proponer is in, from the Nature of his Claim, and Relation to his Party.

For Example, A Nullity of the Execution of a Warning againſt a Tenant to remove, being objected againſt an Adjudger, whoſe Adjudication was expired, by another who was not within the Year of him, but both were infeft, the Lords found the Nullity not competent for that ſecond Adjudger to object, unleſs he were either preferable, or to come in *pari paſſu*, and therefore repelled it as *jus tertii* to him. *Fountainhal*, *Forbes*, 30th *June* 1708. *Rule* contra *Purdie*. So far the Matter is clear.

In a Removing againſt a Tenant, the Defender was not allowed to plead upon the Right of a third Party as preferable to the Purſuer, unleſs he would ſubſume upon ſome Right made to him by the third Party. *Erskine*, Col. *Stuart* contra Laird. of *Grange*. For here the Tenant could not figure the ſmalleſt Advantage in pleading upon the Right of the third Party, unleſs it were, 1*mo*, A Poſſibility that the third Party would not turn him out. 2*do*, That for one Year, at leaſt, he could not, not having given any Warning to the Tenant.

Both

Both which being *accidental* and *contingent*, the Law reſpects not, as not coming up to a *legal Intereſt*, or ſuch a reaſonable Benefit, which being cut out off, he can ſubſume that he has met with material Injuſtice. Which a Tenant can never ſay, who is remov'd upon a legal Warning by any Perſon having a colourable Title to the Lands. All his legal Intereſt is to pay his Rent ſecurely; it belongs not at all to him to object againſt the Purſuer's Title, providing *ex facie* it appear to be good; or to dip into the Queſtion, Whether ſome third Party may not have a better Title.

The like is obſerv'd by *Colvil, December* 1582. Counteſs of *Errol contra* Tenants, where a Liferent being competent to a Lady by her Husband who was only Liferenter himſelf; in an Action of Removing againſt Tenants at her Inſtance after her Husband's Deceaſe, this Exception, that her Liferent was extinct by her Husband's Deceaſe, was repelled, as being *jus tertii* to the Tenants.

Another Example is mentioned by *Spotiſwood, voce, Eſcheat and Liferent*, 23d *March* 1630. *Murray* contra Commiſſary of *Dunkeld*. In a ſpecial Declarator of the Commiſſary of *Dunkeld*'s Eſcheat purſued by Mr. *Patrick Murray*, the Defender propon'd an Alledgance upon the ordinary Back-bond given to the Treaſurer by the Donatar, which bore, that he ſhould not uſe the Gift to the Prejudice of the Rebel's Creditors. This the Rebel alledged might be propon'd in his own Name, as well as the Creditors, ſeeing he was intereſted to ſee his Creditors rather paid by his own eſcheatable Goods, than that the Donatar ſhould meddle therewith, and the Creditors be obliged to have Recourſe to his Lands or his Perſon. The Lords

repelled this, as not competent to be proponed in the Rebel's own Name. Here the Rebel had a plain and fix'd Intereſt; but ſtill he was denied the Benefit of the Alledgance, becauſe it was not a *legal Intereſt, ſciz.* ſuch an Intereſt or Benefit he was intitled to by Law. Becauſe a Backbond of the Nature mentioned in the Deciſion can have no Reſpect to the Advantage of the Rebel, whoſe Eſcheat falls *in modum pœnæ*, but reſpects ſolely the Creditors; and therefore the Creditors may plead upon it, the Rebel never can.

In a Declarator of Property, the Defender, pretending no Right in his own Perſon, was not ſuffered to make any Objection againſt the Purſuer's Title, *Stair* 18, *July* 1662, Lord *Fraſer* contra Laird of *Philorth.* Here the Defender, by making the Alledgance and removing the Purſuer, could have no other View, but to retain Poſſeſſion for ſome Time longer; which is ſo far from a legal Intereſt, that it is plainly injuſtifiable: In reſpect it is more reaſonable to give him the Poſſeſſion, who has ſome colourable Title, than to allow it to remain with the Perſon who has no Pretence at all.

And in a Declarator of the Property of Teinds, tho' the Title of the Proceſs was a Progreſs exceedingly ill connected, and labouring under many Infirmities; yet the Lords ſuſtain'd the Title, in the ſame Way, as if the Action had been a Reduction and Improbation of Land-Rights; and found it to be ſufficient againſt naked Heritors pretending no Right to the Teinds of their Lands; and that it was *jus tertii* for them to object againſt it. The Defenders yielded, that any preſumptive Title might do in a Queſtion of Lands, becauſe no Man can pretend the ſmalleſt Intereſt in or to Lands, but in conſe-

quence

quence of ſome Conveyance, ſome written Document, which, if he has not, it is indeed *jus tertii* to object againſt any preſumptive Title in the Perſon of another: But that could never happen in a Queſtion of Teinds, becauſe an Heritor's Right to the Lands, ſuppoſe he has none to the Teinds, gives him a ſufficient *Title* and plain *Intereſt* to object againſt any Man's being declared Titular of his Teinds. Which was inforced from theſe Conſiderations. 1*mo*, That every Heritor has a Right to have his Teinds declared free, rather than the Property of any Man; and that becauſe ſeveral legal Intereſts ariſe to him thereby. 2*do*, Every Heritor has an Intereſt, that his Teinds ſhould belong to the Crown, rather than to a Subject; the *Exchequer* being in uſe to grant Tacks to Heritors of their Teinds at a very eaſy Rate; and rather to belong to the Patron, from whom they can acquire at ſix Years Purchaſe, than to any other Titular, who can demand nine.

The Queſtion comes preciſely here, Whether the Alledgance made for the Defenders, amounted to a *legal Intereſt*, ſuch a Benefit as it was unjuſt to deprive them of? That it is a *legal Intereſt*, the Court was of Opinion, 29th *November* 1710, *Mitchel* contra *Baillie* and *Shearer*, obſerved by *Forbes*, where a Charter of Adjudication of the Teinds of certain Lands, with Infeftment thereon, was not found a ſufficient Title to oblige the Heritor of the Lands to make Payment of the Teinds, without producing the Adjudication itſelf, and inſtructing a Right to them in the Perſon of him they were adjudged from, albeit no other Right appeared to compete.

A Vaſſal being purſued by a Purchaſer of the Superiority, made this Defence, That the Seller's Relict was infeft as conjunct Fiar, and that he the Defender was bound to acknowledge none other for his Superior during her Lifetime; which was ſuſtained *Colvil.*---*May* 1583, Laird of *Capringtoun* contra Laird of *Caldwells*. This Alledgance was not *jus tertii*; becauſe Vaſſals have a legal Intereſt to keep their Charter-cheſts ſhut againſt every one but their proper Superior.

Having thus given a general Idea of my Subject, the Application thereof will beſt be ſeen by Induction of particular Caſes. Which, for Clearneſs Sake, I ſhall range under different Heads.

POSITION I.

A Debitor, purſued by an Aſſigney, is founded in an Intereſt to alledge, that it appears ex facie ſcripturæ, *or is otherwiſe neceſſarily conſiſtent with his Knowledge, that there is no Right in the Aſſigney's Perſon, becauſe, in this Caſe, he cannot pay ſafely. But if* ex facie ſcripturæ, *by the Production, it appear, that the Aſſigney's Right is founded, the Debitor cannot be allowed to plead upon any Exception to take away the Aſſigney's Right, unleſs it be ſo notorious, as neceſſarily to ſuperinduce a* mala fides. *Such an Exception is* jus tertii *as to him, he has no Intereſt in it; all his Concern is to pay ſafely, and he pays ſafely when he pays to the Man who has the Face of a Title, eſpecially* interpoſita authoritate prætoris.

As to the firſt Branch of the Poſition, ſee *Durie March* 5. 1624. *Ramſay* contra *Mackieſon*. Here a De-

a Debitor being purſued by his Creditor upon a Bond, it was found competent for him to propone this Alledgance, That the Purſuer's Eſcheat was gifted, and the ſpecial Declarator intimated to him the Debitor; which Declarator, though afterwards paſſed from as to him by the Donatar, was equivalent as if the Purſuer had been denuded by an Aſſignation intimate; and therefore he could not pay *bona fide*.

As to the ſecond Branch, ſee *Durie*, 21. *December* 1621, *Hamilton* contra *Durham*; in which this Exception proponed by a Party in whoſe Hands Arreſtment was laid, was repelled, as being *jus tertii*, *viz.* That the Arreſter could not demand the Sum to be made furthcoming, in regard he had recovered Payment from the common Debitor.

James Ballantine took a Bond payable to himſelf, and after his Deceaſe to *Ballantine* his Son; *John Ballantine*'s Name was afterwards filled up in this Bond, though he was born after the Date thereof; and he was found to have good Action as a Subſtitute againſt the Debitor, who had no Intereſt to debate how *John*'s Name came into the Bond, that being *jus tertii*, ſeeing there was no other Heir or Child pretending Right. *Stair*, *Dirleton*, 5. *January* 1675. *Ballantine* contra *Edgar*.

A Debitor objecting againſt the Donatary of his Creditors Forfeiture, That the Creditor himſelf was only an Executor, which, being an Office, could not be aſſigned, far leſs could be carried away by the Forfeiture, except as to the Executor's own Share; the Lords found this Alledgance *jus tertii* to the Debitor, and therefore repelled it. *Fountain-*

hall

hall 4*th November* 1686, *Graham* contra *Lin.* There may be ſome Doubt as to this Deciſion. The Purſuer here had not even a colourable Title. The Defect appeared *ex facie ſcripturæ.* It ſeems incumbent upon a Defender to take Notice of ſuch a Defect, and upon the Judge to ſuſtain it for the Benefit of thoſe who ſhall really be found to have the *jus exigendi.*

POSITION II.

It is not jus tertii *in a Defender to found upon the Right of a third Party, when the Intent is only to make out, that he himſelf is not liable.*

In a Purſuit for liquidating the Avail of a Marriage, it being alledged by the Donatary, That it was *jus tertii* for the apparent Heir to ſay, that his Father died not in the Fie, as being denuded by an Adjudger who was publickly infeft, unleſs that Adjudger would appear and defend; the Lords found, That it was not *jus tertii,* but competent to the apparent Heir to found upon it. *Fountainhall,* 13. *February* 1707, Lord *Rae* contra *Innes.*

POSITION III.

When Payment is offered to a Creditor, it is jus tertii *for him to object, that the Perſon is not entitled to make the Offer; becauſe a Creditor is bound to accept of Payment from whatever Hand.*

A Party ſerved and retoured Heir to a Defunct, offering to redeem an Adjudger, who alledged, that the

the Party to whom the Heir was retoured was preſumed alive, his Death not being inſtructed; the Lords found, That the Alledgance was *jus tertii* to the Adjudger, and ſuſtained Proceſs at the Heir's Inſtance upon the Retour produced, in regard there was no nearer Heir quarrelling the ſame, 27. *July* 1688, *Hay* contra *Dobbie*. The Matter comes here, An Adjudication within the Legal, which was the Caſe here, being only a Security for Debt, may be extinguiſhed by whoever offers Payment. After Expiration of the Legal, when it becomes a Right of Property, the Adjudger is not bound to debate the Relevancy of Objections tending to annul his Right, or open the Legal, unleſs with a Perſon connecting a good Title to the Lands.

In the Redemption of a Wadſet by an Appriſer of the Reverſion, it was found *jus tertii* for the Wadſetter to alledge, the Appriſing was fallen by Preſcription. *Fountainhall*, 7. *November* 1704, *Nicol* contra *Park*. Here the Preſcription might have been interrupted, and it was not reaſonable to oblige the Appriſer to enter into this Diſpute with a Perſon who had no other Intereſt but to get Payment. But this Matter is not without ſome ſeeming Difficulty; for if a Wadſet be conſidered only as a bare Security for Money, there does not a Reaſon occur why it ſhould not be extinguiſhable by any Perſon whatever offering Payment. If it be conſidered as a Right of Property in Lands redeemable only by the Reverſer himſelf, and thoſe deriving Right from him by effectual Conveyances; upon that Suppoſition the Wadſetter ought to be allowed to make every Objection againſt the Title of the Redeemer; and in my Opinion would be well

founded in the Objection of Preſcription mentioned in the Caſe.

POSITION IV.

It is not jus tertii *in an apparent Heir to alledge, That the Purſuer has no* jus agendi, *though the apparent Heir refuſes to acknowledge the paſſive Titles.*

The Reaſon is, That regularly before the Defender is obliged to recur to any Defences, the Purſuer muſt ſhow, that he is founded in his Action; and unleſs he make out this Point, the Defender is not obliged to ſay whether he repreſents or not, being founded in a legal Intereſt to keep this Matter private from every one, ſave the Defunct's juſt Creditors. Thus then, an apparent Heir, without involving himſelf in the paſſive Titles, may propone every Objection againſt the Purſuer's Claim, that ariſes *ex facie ſcripturæ*, or that he can otherwiſe inſtantly verify. Objections indeed that require a Proof, ſtand upon another Footing: Not that it is *jus tertii* in the Defender to propone them; the Reaſon why the apparent Heir, after proponing ſuch Objections, is not ſuffered to deny the paſſive Titles, is alenarly the Hardſhip upon the Creditor, in obliging him to ſuſtain a long Proof, which cannot poſſibly be of any Benefit to him, ſo long as the Defender has in it his Power to deny the paſſive Titles.

POSITION V.

In a Competition betwixt two Rights to the ſame Subject, whereof the one, under which my Competitor claims, is in it ſelf preferable, it is jus tertii *for me to object, That his Progreſs is not well connected; which is only competent to one having a more compleat Progreſs to the ſame Right or Intereſt.*

For Example, *A* has an abſolute good Progreſs to the Infeftment *X*. *B* has but a lame Progreſs to the Infeftment *Y*. Yet *B* is preferred, *Y* being ſuppoſed the preferable Infeftment. And the Reaſon is, It is juſt to give *B* who has at leaſt a doubious Title, a Preference to *A* who can have no Pretence, as long as the Infeftment *Y* is in the Field. The reſpective *Intereſts* produced are ranked according to their legal Preference. And the Perſons claiming upon theſe Intereſts, if they have any Appearance of a connected Title, take their Places accordingly. This being premiſed, it is obvious, That *A* can have no *legal Intereſt* to impugn *B*'s Progreſs: For tho' it ſhould be found, That *C* has Right to the Infeftment *Y* and not *B*, that does not benefit *A*, he can propoſe to himſelf no Advantage by gaining the Point; becauſe in that Caſe, the Judge would prefer *C*, and not *A*.

The Right of a Feu Vaſſal being appriſed from him, and the Appriſing again diſpon'd to another, the Superior's Heir raiſed Reduction and Improbation againſt the Diſponee, and obtained Certification againſt the principal Saſine on the original Char-

ter, and againſt the Grounds and Warrants of the Appriſing. Notwithſtanding of which, it was found *jus tertii* in the Purſuer, to quarrel the Want of theſe Writs; in reſpect that, as Heir to the Ganter of the original Feu Charter, he was liable to warrant it. *Fountainhall*, 1 *February* 1712. Earl of *Forfar* contra *Gilhaigie*: Obſerved alſo by Mr. *Forbes*, as of 31. *January* 1712. For the original Feu Charter, which was produced, being plainly preferable to the Purſuer's Claim of Property, ſince he was debarred thereby, it was the ſame Thing to him, who was Vaſſal; in that Queſtion he could have no legal Intereſt.

In two mutual Declarators, touching the Right of a Salmond Fiſhing, the one produced a Charter from his Majeſty, with a well connected Progreſs, down to the Time of the Competition; the other produced a Right from a Subject of a much older Date, but not well connected, for many of the interveening Years; in ſo much that his Progreſs, ſo much of it as was well connected, did not go ſo far back as his Competitor's. Yet it was found, That the Perſon deriving Right from his Majeſty had no *Intereſt*, to object the Want of Mid-couples to the other: And that it was *jus tertii*, and incompetent for him to object and obtrude that Defect, unleſs he derived Right from the ſame Author, or any ſucceeding in his Right. *Fountainhall*, 3. *December* 1701. *Forbes* of *Watertoun* contra *Udney*.

In a Competition anent the Property of Lands, betwixt a leſs preferable Intereſt, and an Adjudication of the preferable Intereſt, it was found *jus tertii*, in the Party compeating upon the leſs preferable Intereſt, to alledge, that the Adjudication was ſatisfied

tisfied and paid, by Intromiſſions within the Legal. *Forbes*, 19. *June* 1713. *Murray* contra *M'lellan.*

POSITION VI.

In a Competition, I am not allowed to found upon the Intereſt of a third Party, as preferable to that of my Antagoniſt.

The Proof of the immediately foregoing Poſition is equally applicable to this.

John Murray ſerved himſelf Heir in general to *Alexander Maxwel* his Grandfather, and upon that Title did compeat with *Neilſon* of *Chaple*, who had Adjudications in his Perſon, led originally againſt the ſaid *Alexander Maxwel*, conveyed by the Creditor to *Eliſabeth Maxwel*, and from her to the ſaid *Neilſon* of *Chaple*. It was contended for *John Murray*, That *Eliſabeth Maxwel* the intermediate Author had diſponed theſe Appriſings to her Husband *Gilbert M'Cartney*; and that therefore *Neilſon*'s Right was null, as granted *a non habente poteſtatem*. The Lords found it *jus tertii*, for *John Murray*, to found upon the Right of *Gilbert M'Cartney*, unleſs he derived Right from him. This was found *anno* 1727. in the Competition *Neilſon* of *Chaple* and *Lanerick* of *Ladylands*, with *John Murray*. Here the Objection againſt *Neilſon*, *viz.* That his Author was denuded, and conſequently that he could have no Right, was in it ſelf good: But then his Competitor was not allowed to found upon it, becauſe he could ſhew no legal Intereſt therein. For what if *Neilſon*'s Right ſhould be found null? That would ſignifie to *M'Cartney* indeed, if he pleaſed to

appear,

appear, but nothing to *Murray*, who was at any Rate excluded by the Adjudications, whoever had Right to them.

POSITION VII.

But as Law allows me to uſe every Argument tending to annull or cut down the Title upon which my Competitor founds, when the Conſequence is to prefer my own Title, it is not Jus Tertii *to found upon the Intereſt of a Third Party, when it tends to prove, not that the Third Party is preferable, which would be* Jus Tertii, *but that I my ſelf am preferable by the Nullity of my Competitor's Right.*

X is infeft in Lands. He gives a Diſpoſition containing Procuratory to *A*, who aſſigns, firſt to *B*, and then to *C*; but *C.* is firſt infeft. Betwixt the Dates of theſe two Infeftments, *X* grants a Second Diſpoſition to *D*, who obtains himſelf infeft prior to *B*, but poſterior to *C*. Upon the Suppoſition, *That a perſonal Conveyance denudes of a perſonal Right*, quæritur, How is this Matter to be extricated? *B* is preferred to *C* upon the Footing of this Brocard, *A* being ſuppoſed entirely denuded by his firſt Aſſignation in Favours of *B*. *C* is preferred to *D*, as firſt infeft, and *D* to *B*, for the ſame Reaſon. And thus the Matter becomes plainly inextricable, unleſs *D* be allowed to plead that *C*'s Infeftment is null, as flowing *a non habente poteſtatem*, his Author *A* being *ab ante* denuded in Favours of *B*. The Difficulty in this Caſs is, That it is *jus tertii* for *D*. to plead upon *B*'s Aſſignation. The Anſwer is, That this very Example muſt ſhow it not to be *jus tertii*; Since the Conſequence would plainly be to make the

Affair

Affair inextricable, which is a downright Abſurdity. To take a general View of the Matter, it appears without Controverſy, that *D* is the Man who is firſt legally infeft, and who has firſt denuded the common Author *X*. Now if this be the plain Matter of Fact, I can ſee no good Reaſon why *D* ſhould not be allowed to found upon it. It is a Rule in our Law, that *alii per alium acquiritur obligatio*; the Principle upon which this is founded will equally ſupport another Rule, that *alii per alium acquiritur exceptio.* And when we conſider the Nature of this Objection of *jus tertii*, the Difficulty will evaniſh; according to the Definition, it ariſes from pleading a Point, wherein the Party has no *Intereſt*, and the gaining of which cannot profit him. The direct contrary is the Caſe here, for if *C*'s Infeftment be found null, *D* comes in of Courſe.

To explain this Matter further, let us take a View of a Deciſion obſerved by *Forbes* 18th *Dec.* 1708. Colonel *Erskine* contra Sir *George Hamilton*; in which a Perſon having a real Right in Lands, was allowed to object againſt a competing Adjudication, that it was null, as being led upon a Bond payed by the Debitor; albeit he who quarrelled the Adjudication, derived no Right from the Perſon againſt whom it was led.

This Deciſion is obviouſly well founded; and yet therein we ſee a Party allowed, to found upon the Deed of a third Perſon with whom he does not connect, *viz.* the Payment made to his Competitor by the common Debitor. And he is allowed to do ſo, for this preciſe Reaſon, that thereby he comes to eſtabliſh a Preference to himſelf. Now I can ſee no Difference betwixt this Deciſion and the Caſe in Hand. In both a Party is allowed to found upon the

the *Deed* of a third Perſon with whom he has no Connection; and in both he has equally a *legal Benefit* in ſo doing. In a Word, there is nothing more common in Law than to ſee People founding upon the *Deeds* of third Parties; ſuch Alledgances caſt up in a thouſand Shapes every Day: If they can ſhew no *legal Intereſt* in ſo doing, it is *jus tertii* they are debarred *perſonali objectione*: If they can ſhow a legal Intereſt, they ought to be heard. This is alſo fortified by the Doctrine contained in Poſition II. for if a Defender can found upon the Right of a third Party, in order to obtain *abſolvitor*, for the ſame Reaſon may a Competitor found upon the Right of a third Party to obtain *Preference*.

Another Caſe is related by Lord *Stair* 22d *July* 1668. *Johnſton* contra *Arnold*, to this Purpoſe; In a Competition betwixt two Appriſings, whereupon Infeftment had followed, both led before the A& bringing in Appriſers *pari paſſu*; The firſt Appriſer was alſo firſt infeft: But it was objected againſt the Infeftment by the ſecond Appriſer, that it was null, being in Name of an Aſſigney to the Appriſing, who did not appear to have any Right, no Aſſignation being produced. This the Lords ſuſtained, and did not find it *jus tertii* to object the Want of the ſaid Aſſignation.

N. B. The Competition run betwixt the ſecond Appriſer and the Heir of the firſt Appriſer, who had alſo in his Perſon a Conveyance from the Aſſigney, in whoſe Name Inſeftment was taken.

POSITION VIII.

Where an Alledgance tends not to make my Party's Title abſolutely null, but only reduceable or annullable at the Inſtance of a third Party, it is jus tertii *for me to found upon it.*

For Example, a Donatar of Ward and Non-entry purſuing the Vaſſal for the Non-entry Duties fallen due ſeveral Years after elapſing of the Ward; this Gift of Non-entry continues but three Terms after the Ward in Competition with the King or another Donatar, but is ſtill good againſt the Vaſſal; and therefore it is reckoned *jus tertii* for him to found upon it. *Haddington*, 6th *July* 1611. *Dickſon* contra Laird *Dawick*; A Spuilie was ſuſtained, altho' at committing the ſame the Party injured was at the Horn, it being found *jus tertii* to the Defender, to alledge, that the Action in that Caſe was competent only to the King and his Donatar. *Maitland*, 16th *June* 1552, Laird *Kinfauns* contra Laird *Craigie*. The Reaſon is, That Denunciation does not *ipſo facto* diveſt the Rebel of his Moveables; he remains ſtill Proprietor until the King pleaſes to take the Benefit of his Rebellion. And therefore the Deciſion would probably have gone otherwiſe, if the Defender could have ſubſumed upon a general or ſpecial Declarator at the Donatar's Inſtance. In a Proceſs at a Miniſter's Inſtance for his Stipend, it was objected by the Heritors, that he was not duely admitted by a Preſentation conform to the Statute 10. *Annæ* reſtoring Patronages; this was found *jus tertii* to the Heritors, being competent only to the Patron himſelf. *Forbes* 18th *June* 1714, *M'Bain* contra

Laird of *Scatwell.* In a Reduction of a Sub-tack upon this Ground, that by a Clauſe therein, if the Sub-tackſman failed in paying of his Tack-duty at certain Terms, the Tack ſhould be null; this Nullity was only found competent to the Tackſman himſelf Setter of the Sub-tack, not to the Maſter; in Reſpect it was not an abſolute Nullity, but in Favours of the Tackſman, if he pleaſed to lay hold upon it. *Durie*, 13th *Dec.* 1626, Earl of *Galloway* contra *M'Culloch.*

It may be worth Notice, that this Poſition does not ſo directly come under the Doctrine of *jus tertii.* In the Deciſions juſt now mentioned, the Alledgeances were repelled, not ſo much upon the Footing of a *jus tertii*, that the Proponer had no Intereſt to make them; but truly becauſe they were by no Means concluſive, did not infer what they were brought to prove, which above all is plain from the laſt mentioned Deciſion, in which there was not wanting a *legal Intereſt* to found the Proponer in his Alledgance of Nullity; he failed only in this, That it was not found to be a Nullity: There is a wide Difference betwixt a *null* Right, and a Right *annullable*; a Nullity in a *Right* may be pled upon by every one who can ſhow an Intereſt in the Queſtion; the Power of annulling, by no Mortal, but who is veſted with the Power.

Benefi-

Beneficium cedendarum actionum.

WHen a Creditor has different Perſons or Subjects bound to him for Security and Payment of his Debt, it naturally ariſes to be a Queſtion, how far he has it in his Power to exerce his Right arbitrarily, by loading one and freeing another; and when he does ſo, if there is any Relief competent to the Perſon or Subject over-burdened. Queſtions of this Nature may be eaſily ſolvable in the ſimple Caſes. But the Connections betwixt Perſons and Subjects, Creditors and Debitors, preferable and ſecondary Securities, caſt up ſo various and intricate, and run out ſo great a Length, that one is apt to loſe himſelf, if he does not begin at Principles, and go on Step by Step from the more eaſy to the more intricate Caſes.

It appears in the firſt Place agreeable to Principles of *Juſtice* and *Humanity*, that Creditors having bound to them different Perſons or their Effects, ſhould not be allowed ARBITRARILY to load one and exempt others. There are two good Reaſons for this, one *a priori*, the other *a poſteriori*. The

one *a priori* is drawn from this Law of Nature, *That every Man is confined in the Way of using his Property so as to be least hurtful to others.* He is allowed to prefer himself; but his own Interest being out of the Question, he has no longer Liberty to go on to take any Step *in æmulationem vicini*, either by directly doing Damage, or by using the Pretext of his Property *arbitrarily* to prejudge one for the Benefit of another. To take this in somewhat a different Light, *Property* was introduced, not that Men should be indulged to use it wantonly, but only in so far as beneficial to themselves. Therefore every Man may use his Property while his private Interest goes along. There his *Power* is at an End. After that the Law takes it out of his Hands, and directs it so as in the whole to do most Good to others. And when the Matter is brought there, it is plain, that the Law, which is no Respecter of Persons, never acts *arbitrarily*, but deals to every one with an equal Hand. The Consideration *a posteriori* is drawn from the numberless Inconveniencies that might ensue if Creditors were indulged in this arbitrary Proceeding: It would naturally introduce underhand fraudulent Pactions betwixt the Creditor, who holds the Ballance, and some one or other of the Debitors, in order to throw the Burden upon others. Every one would endeavour to bribe highest to get himself relieved. And thus Bribery and Corruption would go on to the Destruction of Debitors, whereby their Creditors would have an Opportunity of making unjust Gains by Extortion, which no civilized Country will indulge.

The *Roman* Law and ours go thus far Hand in Hand, that a Debitor paying, is entitled to demand Assignation from the Creditor against his Fellow Debitor, *l.* 17. *l.* 36. *Fidejuss.* Here the *Roman* Law

Law ſtops, at leaſt that of the *Pandects*, and gives no Action for Relief to one Co-debitor againſt another, where the Action is not ceded, *l.* 39. *Fidejuſſ.* This is better ordered in our Law; with us the Debitor who pays, has directly an Action for a proportionable Relief againſt his Co-debitor without Neceſſity of Aſſignation. This is not underſtood to proceed from any Paction expreſt or implied betwixt the *correi debendi.* It flows directly from the above Principle, *ſciz.* That a Creditor is confined from exercing his Right *arbitrarily.* He ought to draw a proportional Part from every one of his Debitors; or if for his own Eaſe he chuſes to draw the whole from one, it is incumbent upon him to aſſign his Debt and Diligence, that the Perſon making Payment may have a proportional Relief off others; and becauſe it is a Rule, *That what ought always to be done, is ever held as done,* the Law, to abridge the unneceſſary Circuit of an Aſſignation, gives directly an Action of Relief to the Debitor making Payment againſt his Fellow Debitors, whether he has an Aſſignation or not. This ſeems to have been the Law of the *Codex*, *l.* 2. *C. de duob. reis*, and this is our common Practice at this Day.

Thus the Matter is fix'd upon the moſt ſolid and equitable Footing, ſo far as relates to *perſonal Relief* amongſt Fellow-debitors; It muſt be acknowledged, that our Practice is but in its Infancy as to *real Relief*, that ought to be competent to the Proprietor or ſecondary Creditor, out of whoſe Fund Payment is drawn againſt the other Funds, upon which the preferable Debt is equally ſecured. To give the plaineſt Example, Two Perſons *conjunctly and ſeverally* oblige themſelves to pay a Sum, and grant each of them an heritable Bond out of their re-

reſpective Lands, upon which Infeftment follows. So far the Matter is clear by our Practice, that the Debitor, out of whoſe Eſtate the whole Sum is made effectual by virtue of the Infeftment of Annualrent, has perſonal Relief off his Fellow-debitor; But why not alſo real Relief? That is, why ſhould he not be intitled to take up the Creditor's Infeftment upon the other Debitor's Lands, in order to be ranked for that Part of the Sum, which he has paid over and above his Proportion? It appears, without Controverſy, that there is the ſame Foundation for both. It may poſſibly be objected, That after the Debt is paid out of one Debitor's Effects, the Bond falls extinguiſh'd with all its Conſequences. But in Anſwer to this it is urg'd, 1*mo*, That it is *jus tertii* for the Debitor himſelf or his real Creditors to plead upon this, ſince in all Events no more is intended to be drawn from him than his Proportion of the Debt. 2*do* & *principaliter*, At any Rate this might have been done by the Circuit of an Aſſignation: Now, as is above laid down, the Law ſupplies this, and grants an implied Aſſignation. For truly the Action for Relief betwixt Co-debitors, whether perſonal or real, is no other than an Action upon an implied *legal* Aſſignation. The Matter then comes out thus; From each of the Debitors the Creditor has ſtrictly Right to demand Payment of the one Half; if he chuſe to poind the Ground of one of the Debitors for the whole, which he may do for his own Conveniency; the Law ſuppoſes, that he takes the one Half in Payment of that Debitor's Proportion of the Debt; but as for the other Half, that is not ſuppoſed taken in Payment of a Debt, which the other Debitor is ultimately liable in, but as the Price of the legal

Aſſign-

Aſſignation; ſee *l.* 36. *Fidejuſ.* And therefore the Creditor's Infeftment remains ſtill good upon the other Debitor's Lands as to that Half, which may accordingly be taken up in virtue of the *legal* Aſſignation, by the Debitor, who has paid the whole. The Benefit of this *legal* Aſſignation would be of conſiderable Effect in Practice. Amongſt others it would remove the Pretext that Debitors have to ſuſpend real Diligence, in order to obtain an actual Aſſignation.

'Tis true, no Traces appear in the *Roman* Law of this real Relief, otherwiſe than by the Circuit of an Aſſignation: With reſpect to which there is a remarkable Text, *l.* 5. *Pr. de Cenſ.* But neither were they acquainted with the perſonal Relief, at leaſt by the ancient Law: However, as the Foundation of real Relief is plainly laid down in the ſaid *l.* 5. *de Cenſ.* it would be no great Stretch to eſtabliſh it, even in the *Roman* Law, by an Argument drawn from the ſaid *l.* 2. *C. de duob. reis.*

The Principle being thus fix'd, it will be eaſy to draw out a Rule for adjuſting all the Kinds of *real* and *perſonal Relief* amongſt Co-debitors and ſecondary Creditors. A Creditor, who has ſeveral Perſons bound to him in a Debt, is ſuppoſed to take Payment equally and proportionally from every one of them. If he chooſes to draw more from any one than his Proportion, this is not underſtood as taken in Payment, but as the Price of an Aſſignation *actual* or *legal.* This intitles the Payer to come in Place of the Creditor as to that Superplus, which accordingly he may draw from the other Debitors. After the very ſame Manner, when a Catholick Creditor, whoſe Infeftment reaches over two Tenements, draws the whole out of one, the Perſon

over-

overburdened, whether Proprietor, or only a ſecondary Creditor, ought to be intitled to act in the Creditor's Name to be refunded of the Superplus over and above his Proportion out of the other Tenement; whereby *Equality* is preſerved amongſt all concerned, and no *Perſon* or *Subject* bears a greater or leſs Burden than his Situation obliges him to. And thus the Rule comes out, THAT REAL OR PERSONAL RELIEF GOES NO FURTHER THAN TO BE REFUNDED OF WHAT THE SUBJECT OR PERSON HAS BEEN BURDENED WITH OVER AND ABOVE HIS PROPORTION.

We muſt now come to Particulars; and for Method's Sake, it may be proper, 1*mo*, To handle ſuch Caſes as fall directly under the Rule. 2*do*, Theſe Caſes, which, by Reaſon of ſpecial Circumſtances, may be ranked under the Head of Exceptions.

PROPOSITION I.

Suppoſing a preferable Infeftment upon the Tenements A. *and* B. *both pertaining to the common Debitor, and a ſecondary Infeftment upon* A. *only, the ſecondary Creditor infeft in the Tenement* A. *out of which Tenement the Catholick Creditor chuſes to draw his whole Debt, is intitled only to a proportional Relief out of the Tenement* B. *tho' there be no other Infeftment upon it, ſave that belonging to the Catholick Creditor.*

This is a direct Inference from the Rule above laid down. The Catholick Creditor is ſuppoſed *fictione juris*, to draw proportionally out of the two Tenements; And if in Fact he does otherwiſe, the Creditor

Creditor overburdened has Relief indeed, but only ſo far as he is overburdened. As to a total Aſſignation againſt the Tenement *B*, it appears obvious, that the ſecondary Creditor upon *A*, is no better intitled to it than any of the perſonal Creditors of the common Debitor. If the Fact be, That he has lent more Money upon the Tenement *A*, than that Portion of it will ſatisfy, which remains after a proportional Allocation of the catholick Right, he has himſelf to blame. Upon that Suppoſition, nothing remains to him, but in common with the perſonal Creditors to attack that Portion of the Tenement *B*, which remains after the ſaid proportional Allocation.

To take this Matter a little more at large, let us examine what muſt be the Conſequences of a Scheme, where it is held, that the ſecondary Creditor upon *A* is intitled to demand a total Aſſignation for his Relief againſt the Tenement *B*, in caſe there is no other Burden upon it beſide the catholick Infeftment. Upon this Scheme it is not ſeen, that any Creditor can well excuſe himſelf for lending upon the Tenement *B*, when there is a ſecondary Creditor upon *A*, and a catholick Creditor over both; for this would be truly defrauding the ſecondary Creditor of his Security. If it be alledged, 1*mo*, That the ſecondary Creditor upon *A*, when he lent his Money took his Hazard of this, it is anſwered, This is no Excuſe to any Party who officiouſly cuts him out of his Hazard, by turning it into a Certainty againſt him. If it be ſaid, 2*do*, That the Creditor contracting upon *B*, was not bound to know of the Creditor upon *A*, the Anſwer is, That at any Rate no Creditor is ſafe to lend upon *B*, without knowing whether there is a ſecon-

dary Creditor upon *A*, becauſe in Proportion to the Extent of the other Debt, his Claim upon *B.* falls to be more or leſs reſtricted : Beſides, it is enough to qualify *mala fides*, that a Man chuſes to do what he ſees may very poſſibly produce Miſchief to others, though the Miſchief be not abſolutely certain. If it be ſaid, 3*tio*, That the Creditor upon *B*, does no more than any Creditor does, who lends upon heritable Security, knowing his Debitor to have perſonal Creditors. The Difference is, that the Tenement *B*, (upon the preſent Suppoſition) is underſtood to be a Security to the Creditor upon *A*, by his Right to demand Aſſignation preferable to all other Creditors; which Security the Creditor upon *B* in Part cuts him out of. Now perſonal Creditors have no Security upon their Debitors Lands; they may effect it by Diligence; but ſo may they the Money come in its Place. From all which it appears, that if it be a lawful Commerce for a Creditor to lend upon *B*, while there is another ſecondary Creditor upon *A*, and a catholick Creditor over both, which cannot be diſputed, it muſt follow, that the Creditor upon *A*, has but a proportional Relief off the Tenement *B*, even when there is no Burden upon *B*, ſave that of the catholick Creditor's.

What is ſaid here withReſpect to a Creditor lending upon *B*, may be applied with equal Force to a Purchaſer of the Subject.

CORROLLARY.

Hence in the proportional Relief betwixt the ſecondary Creditors, the Creditor upon *B*, though poſterior, is in no worſe Situation than the Creditor upon *A*, though prior.

SCHO-

SCHOLIUM.

It is laid down in the Propoſition, that the ſecondary Creditor upon *A*, is *entitled* only to a proportional Relief out of the Tenement *B*. Now this he can demand of *Right*, and can by no Alteration of Circumſtances be cut out off. But at the ſame Time there is nothing to bar the catholick Creditor from aſſigning *in totum*, if he pleaſes, ſo long as no ſecondary Creditor appears upon the Tenement *B*; The granting of an Aſſignation in ſuch Circumſtances, not being a Matter of *Juſtice* or *Equity*, in which one is tied down, but of pure *Favour*, the very Conception of which ſuppoſes the Action to be *voluntary* or *arbitrary*.

'Tis very true, that in this Situation the catholick preferable Creditor has it in his Power to *favour* either the ſecondary Creditor upon *A*, or the perſonal Creditors who have not attached either of the Subjects. If he deny an Aſſignation, all that remains for the ſecondary Creditor upon *A*, after adjuſting the proportional Relief, is to adjudge the Tenement *B*, *pari paſſu* with the perſonal Creditors, which will entitle him to a Share of what remains of the Tenement *B* unexhauſted, after the proportional Relief. If on the other Hand, the catholick Creditor vouchaſe to grant Aſſignation, the perſonal Creditors have no Acceſs, unleſs the two Tenements do more than ſatisfy both the real Debts. This indeed is an *arbitrary* proceeding; but at the ſame Time not ſuch as the Law has any Caveat againſt; becauſe, as above laid down, in Matters of *Favour* every one muſt act *arbitrarily*. The perſonal Creditors having no *Nexus* upon the Tenement

B, having not ſo much as the Pretence of lending their Money upon the Faith of it, are founded in no Title to oppoſe a total Aſſignation. The catholick Creditor is not ſo much as bound to know, that there are any perſonal Creditors, and has no Counection or Concern with them. When therefore in theſe Circumſtances the catholick Creditor chuſes to *favour* the ſecondary Creditor upon *A*, by granting him a total Aſſignation; this is not *cutting down*, or *hurting* one Creditor in favours of another, ſince the perſonal Creditors have no *Nexus* upon the Tenement *B*; 'tis at moſt but diſappointing them of a Hope, which may be *lucrum ceſſans*, but is by no Means *damnum datum*. 'Tis another Caſe if the perſonal Creditors have by Diligence attached the Tenement *B*. 'Tis thought that even a bare Citation in an Adjudication is a ſufficient *Nexus* upon the Tenement *B*, to enforce a proportional Relief betwixt them and the ſecondary real Creditor upon *A*. For after Citation, it is no longer a Matter of *Favour*, but of *Juſtice* and *Equity*.

Yet after all, if there's any Appearance, that a total Aſſignation is the Reſult of a Contrivance betwixt the two real Creditors, to diſappoint the perſonal Creditors, 'tis left to be conſidered, if, upon that Suppoſition, the Aſſignation might not be cut down upon the Head of *Colluſion*: And there would be the more Ground for this, if ſuch Aſſignation were granted after nottour Bankruptcy, which indeed would be very ſuſpicious.

PRO-

PROPOSITION II.

Supposing still a catholick Creditor over the Tenements A *and* B, *the same proportional real Relief will be competent betwixt the secondary Creditor upon* A, *and a Purchaser of the Tenement* B, & e contra.

For there being no greater Connection betwixt the catholick and secondary Creditor, than betwixt the catholick Creditor and the Purchaser, there appears nothing in the Variation of Circumstances to disturb the *proportional Allocation* of the catholick Debt, which brings it to the common Case. If it be objected, That the Purchaser upon the Obligation of *Remuneration* is entitled to a total Assignation, since the catholick Debt is drawn out of his Funds; whereas, when it is taken out of the Tenement *A.* it is drawn out of Funds that belong to the common Debitor, which does not entitle the secondary Creditor to *Remuneration*; the Answer is, That neither is the Purchaser here entitled to *Remuneration.* The catholick Creditor is not bound in any Sense to acknowledge the Purchaser. When he draws his Payment out of the Tenement *B*, though now no longer in his Debitor's Person, he is doing no more but explicating his own Right; and therefore there is no Connection, no *negotium gestum inter eos* to infer any such *Remuneration.* If it be urged, 2*do*, That the Purchaser in this Case being intitled to Relief off the common Debitor upon his *Warrandice*; it is answered, That the secondary Creditor upon *A*, when he is cut out by the catholick

tholick Creditor, has as well founded a Title for Relief.

COROLLARY.

If the Purchaſer of the Tenement *B*, retain ſufficient in his Hand to ſatisfy the catholick Debt, in that Caſe if the catholick Creditor draws Payment out of *A*, the ſecondary Creditor upon that Subject is founded in an Action againſt the Purchaſer for a proportional Relief. And what is over and above in the Purchaſer's Hands, remains to be affected by the Diligence of all the Creditors, perſonal and real. If he chuſe to draw his Payment from the Purchaſer, the perſonal Creditors are not entitled to a Relief out of the Tenement *A*; ſee what is laid down in *Schol. Prop.* I.

SCHOLIUM 1.

From the whole taken together, it appears to be the ſame whether the Subjects belong to the ſame, or different Proprietors; and whether the Perſons claiming Relief be ſecondary Creditors or Purchaſers.

SCHOLIUM 2.

The above Doctrine will hold equally in all Sorts of Diligence, Infeſtments of Annualrent, Adjudications, Inhibitions, or Arreſtments.

PRO-

PROPOSITION III.

If the Catholick Creditor lend a ſecond Sum to the common Debitor upon the Subject A, *before the Exiſtence of any Debt upon* B; *in this Caſe the proportional Allocation will not obtain. He is at Liberty to draw his preferable Sum out of the Tenement* B, *in order to make his ſecond Debt effectual upon the Tenement* A.

This follows from the firſt Principle. For the proportional Allocation obtains only when his own Intereſt is out of the Queſtion. And it cannot be ſaid that he acts *arbitrarily*, in drawing his preferable Debt out of *B*, when he has the reaſonable View of ſaving his other Debt upon *A*. Nor is any one prejudg'd thereby, ſince it is eaſy to know from the Records what Debts are upon the Tenement *A*. Before a Creditor is in ſafety to lend upon *B*, it is requiſite at any Rate to know what Burdens are upon *A*, preferable to the Catholick Infeftment. And it is not a great additional Trouble to ſearch forward to the preſent Time. Add to this as a Matter without Diſpute, that the Catholick Creditor *rebus integris* may renounce either of his Securities to the Debitor, and by the ſame Reaſon therefore may he lend.

SCHOLIUM.

The ſame will obtatin where the Catholick Creditor purchaſes in the ſecondary Creditor's Debt upon *A*, or conveys his own Debt to the ſecondary Creditor; 'tis true, the perſonal Creditors may here come

come to be diſappointed; but this is not inconſiſtent; ſee *Schol. Prop.* I.

PROPOSITION IV.

But where there is already a ſecondary Creditor upon the Tenement A, *if the Catholick Creditor chuſe to lend a ſecond Sum upon* B. *In this Caſe the proportional Relief will obtain, tho' directed againſt himſelf.*

Becauſe, otherwiſe, he would be in *mala fide* to lend to the common Debitor, ſince it tends to cut out the Creditor upon *A*, who had Reaſon to truſt to a proportional Relief; and were this otherwiſe, no Creditor, who ſees a Catholick Infeftment over two Tenements, would be in Safety to lend his Money upon either.

PROPOSITION V.

Suppoſing a Catholick Infeftment upon two Tenements, and a ſecondary upon each, if the Catholick Creditor purchaſe in either of the ſecondary Infeftments, he is liable to the proportional Relief. The ſame will obtain, if either of the ſecondary Creditors purchaſe in the Catholick Infeftment.

This is a Conſequence of *Prop.* IV.

PROPOSITION VI.

The Catholick Creditor, while there is no other Incumbrance upon the two Tenements, may renounce his Right upon either of them to the Debitor himſelf, or in Favours of another Creditor lending his Money. But after the Exiſtence of the ſecondary Debt upon A, *he cannot renounce his Right upon the Tenement* B ; *if he does, it can only be in ſo far as relates to himſelf.*

This is plain from *Prop.* 4th and 5th. It will be proper here to obviate a Scruple that ariſes with Reſpect to this Propoſition. Let us put the Argument in the Mouth of a perſonal Creditor, who may urge it as a hard Caſe, the Tenement *B*, lying open for him to adjudge, whereby he would have the Benefit of a proportional Allocation, if the Law ſhould cut him out, by ſuffering the Catholick Creditor to renounce in Favours of the ſecondary Creditor upon *A*. The ſame, ſays he, indeed happens, if the Catholick Creditor purchaſes in the ſecondary Debt upon *A*, or aſſigns his Right to that ſecondary Creditor; but this muſt be allowed for the Sake of Commerce, that Creditors be not debarr'd from taking Money for their Claims. In Anſwer to this, it is allowed, that if the Renunciation can be proven the Reſult of a Contrivance to diſappoint the perſonal Creditors, I know not if this might not be underſtood as colluſive, and which muſt always be underſtood, if the Renunciation be after notour Bankruptcy ; but otherwiſe Renunciation may be as neceſſary for Commerce as either of the other two Caſes. For put the Caſe, the ſecondary Creditor

upon *A* refuſes to truſt his Money any longer in the common Debitor's Hands, unleſs he get an additional Security upon *B*, or a Renunciation from the Catholick Creditor, if the laſt be choſen, as more eaſily expedited, 'tis obvious the perſonal Creditors have nothing to complain of. See what is further ſaid *Schol. Prop. 1ſt.*

Theſe four laſt Propoſitions are plainly in Principles; but there may be ſome Diſpute in the Execution. For they ſuppoſe, that before the Catholick Creditor can renounce the Tenement *A*, or lend upon it, or purchaſe in a Debt already contracted, he muſt ſearch the Regiſters, leaſt there be a Debt already contracted upon *B*; if he lends or purchaſes in, no Queſtion it is *cum priculo.* As for renouncing, he may do it ſafely; but the Creditor, in whoſe Favours the Renunciation is made, is by no Means in Safety to rely upon it without knowing what Burdens are upon the other Tenements ſubjected to the Catholick Infeftment. Another Inconvenience is, That there's no abſolute Certainty of coming to the Knowledge what Renunciations have been granted. For if even the Declaration of the Catholick Creditor ſhould be thought a ſufficient Security, tho' that is not always eaſy to be obtained, yet frequently the Debt ſtands in the Perſon of a ſingular or univerſal Succeſſor. To remedy theſe Inconveniencies, it might be proper by an Act of *Sederunt* to appoint, 1*mo*, Secondary Creditors, when they contract, to intimate their Rights to the Catholick Creditor; under this Certification, That otherwiſe the Catholick Creditor ſhall be at Liberty to contract, acquire or renounce, as if ſuch ſecondary Debt were not exiſting. 2*do*, To appoint Renunciations to be regiſtred, which will give abſo-

abſolute Security to contract upon Tenements whereupon there is already a preferable Catholick Infeftment. We will ſee from Deciſions to be mentioned hereafter, how far this is underſtood to be neceſſary; and how far already fix'd.

To conclude this Head, it often happens to be doubtful after what Manner this proportional Allocation of the preferable Creditor's Right is to be extricated, by Reaſon of the peculiar Nature thereof, or of the Rights of the ſecondary Creditors. To give an Inſtance.

Let us ſuppoſe three Adjudgers, *ſciz.* a Catholick Adjudger of both Tenements; *2do*, An Adjudger coming in *pari paſſu* upon the Tenement *A*. *3tio*, An Adjudger without Year and Day upon the Tenement *B*. The Difficulty in this Caſe is, That the Catholick Adjudger is not ſimply preferable to the other two Adjudgers, as in the ordinary Caſes. But it may be reduced to the ſimpleſt Caſe thus. Let the Tenement *A* be ſuppoſed divided betwixt the two Adjudgers in Proportion to their reſpective Debts. This becauſe they come in *pari paſſu*. Lay aſide altogether that Proportion of the Tenement *A*, which befalls the Creditor who comes in *pari paſſu* with the Catholick Adjudger upon that Tenement. This pays his Debt *pro tanto*; and as for the Remainder, it comes in as a ſecondary Debt upon that Proportion of the Tenement *A*, which falls to the Share of the Catholick Creditor. The Caſe then reduced to its ſimpleſt Terms ſtands thus. A Catholick Right over a certain Proportion of the Tenement *A*, which we ſhall call *D*, and alſo over the whole Tenement *B*. A ſecondary Right over *B*, *ſciz.* the Adjudication without Year and Day; a ſecondary Right over *D*, *ſciz.* the Remainder of

the other Adjudger's Claim, over and above what his Share of the Tenement *A* comes to: And when the Queſtion is reduced to theſe Terms, the Rules for the proportional Allocation are eaſily applicable.

Let each of the Debts be 6, and each of the Tenements worth 6. In the firſt Place, lay aſide 3, as a *præcipuum* to the ſecond Adjudger upon *A*. This being done, we have a catholick Creditor over the Tenement $D = 3$, and of the Tenement $B = 6$. Out of theſe two Tenements, he ought to draw his Sum proportionally; that is 2 out of *D* and 4 out of *B*. (2 being to 4 as 3 to 6) after which there remains 2 to the Creditor upon *B*, 1 to the Creditor upon *A*. So upon the whole, the catholick Adjudger draws his 6, the Adjudger coming in *pari paſſu* with him upon the Tenement *A* draws 4, and the other Adjudger upon *B*. only 2.

Let us vary this Caſe a little, and ſuppoſe all the three adjudges within Year and Day, and let the Numbers be the ſame, ſave only, that the Adjudger upon *B*, is only 3. Here ſtriking out the ſecond and third Adjudgers Claims, ſo far as they come in *pari paſſu* with the catholick Adjudger, there will remain two Subjects, 3 which remains of *A*, 4 which remains of *B*, over which the catholick Adjudger is preferable, and out which he is to draw his Debt 6 proportionally. Which is $2\frac{4}{7}$ out of 3, and $3\frac{3}{7}$ out of 4. So that the catholick Adjudger draws his whole 6. The Adjudger upon *A* draws $3\frac{3}{7}$ the Adjudger upon *B* $2\frac{4}{7}$.

Let us now ſuppoſe the Legals to be expired, and ſee what Alteration that makes. Here the Adjudications, that before were Rights in Security, limited to the Payment of the Debt ſecured, become

now

now Rights of Property. Thus then in the firſt of the two Caſes, the catholick Adjudger now no longer reſtricted to his Claim of 6; in the Diviſion of the Property with the other Adjudgers, claims the Half of the Tenement *A*, and the whole Tenement *B*. And in the other Caſe, he draws the Half of the Tenement *A*, and $\frac{4}{8}$ of the Tenement *B*.

To give another Inſtance, where the Application of this Rule may ſeem to be attended with ſome Difficulty. The Caſe is; after an Inhibition, the Debitor grants a perſonal Bond to one, and alienates a Parcel of Land to another; the Inhibiter attacks the Purchaſer, Is he bound to aſſign *in totum*? The Difficulty is, That here there appears no Place for a proportional Allocation, there not being two Funds, out of which the Debt ſecured by Inhibition may be drawn. The Anſwer is, That the perſonal Bond granted after Inhibition muſt be conſidered as one Fund, at leaſt ſo much of it as comes to be made effectual againſt the bankrupt Eſtate by Adjudication, and the Lands diſponed as another. And therefore, that tho' the Inhibiter may aſſign *in totum*, yet the Aſſigny cannot uſe it, but proportionally againſt the perſonal Creditor adjudging. But if the Aſſignation to the Purchaſer is ſuppoſed prior in Date, to the Adjudication upon the perſonal Bond, there the Aſſignation may be uſed *in totum*, *per* Corrol. Prop. IV. Simular to this is Diligence by Horning againſt a Bankrupt, which is made uſe of to found a Reduction, upon the Act 1621. In this Caſe the Creditor reducing is bound to aſſign his Debt and Diligence, but then the Aſſigny cannot extend it againſt other Alienations, made prior to the Aſſignation, otherwiſe than proportionally

portionally; but as to Alienations made after, he may extend it *in totum.*

Let us now touch ſome of the *Exceptions*, where this proportional Relief is denied, upon ſpecial Circumſtances.

It will be remembred, as laid down in the Beginning of this Eſſay, That the proportional Allocation and Relief obtains, when ſeveral Perſons or ſeveral Subjects are bound equally to the ſame Creditor; the Inequality of the Obligation will, in all Caſes, diſturb this Rule. As for Example, where one Perſon or Thing is bound principally, an other only *in ſubſidium.*

As to Caſes of this Kind, take the following Rule.

PROPOSITION VII.

When two Perſons or Subjects are bound unequally, the one principally, the other in ſubſidium, *the proportional Allocation cannot obtain. But the ſubſidiary Obligant is intitled to a total Aſſignation againſt the Principal, and has a total Relief.*

This naturally follows from the Doctrine above laid down; for if an Equality of Obligation infer a proportional Aſſignation or Relief, an Inequality of Obligation muſt infer a diſproportional Aſſignation or Relief: And thus it is founded in the general Principle, that Cautioners, who have renounced the Benefit of Diſcuſſion, have yet the Benefit *Cedendarum actionum.*

And, *Firſt*, Of the ſtrict Cautionry Obligement, the Intendment of which is, that the Cautioner ſhall pay, if the Principal be inſolvent, and which

which therefore infers the Benefit of Diſcuſſion; here it is obvious, that there is no proportional Relief betwixt the Principal and Cautioner. After the principal Debitor is diſcuſſed, the Creditor attacking the Cautioner, is bound to aſſign his Debt and Diligence, that the Cautioner may make the beſt of them. Abſtracting from the Principles above laid down, this is otherwiſe plain from the following Conſideration, that as the principal Debitor is liable ultimately for the Debt, the Diligence ought to be kept up, in order to attack any future Funds accruing to him. And ſince the Creditor is out of the Queſtion, by the Cautioner's making Payment, the Diligence ought to ſtand in the Cautioner's Perſon. The Obligation to aſſign being thus founded in the Nature of the Cautionry Contract, it follows, that the Creditor may not with-hold it upon a Pretext, as if no Man were bound to aſſign againſt himſelf. For 'tis obvious the principal Debitor is not ſufficiently diſcuſt, ſo long as the Creditor retains to himſelf Securities for his ſeparate Debt, upon Subjects belonging to the principal Debitor. It makes no Objection what was found, *l.* 2. *C. Fidejuſſ.* becauſe, at the Time of this Law, *Fidejuſſores* had not the *beneficium ordinis aut diſcuſſionis*, being introduced afterwards by *Juſtinian*, ſee *Nov.* 4. *C.* 1.

In this Matter a Queſtion may ariſe, relating indeed principally to the Nature of an Inhibition. Let us ſuppoſe a Man lends Money upon a perſonal Bond and inhibits the Debitor; thereafter he lends another Sum to him ſecured by Inteſtment. Laſt of all the Debitor grants a Bond of Corroboration of the perſonal Debt with a Cautioner. When the Cautioner pays, without Controverſy he has a Right

to

to the Inhibition. Upon this the Queſtion ariſes, Whether the Inhibition aſſign'd to the Cautioner does ſtrike againſt the Creditor's heritable Bond? Which reſolves into a Diſpute anent the Nature of an Inhibition, whether it be *real*, that is, directed to the Debt, and intended to guard it, or only *perſonal*, directed to the Creditor; that is, in other Words, whether Inhibition be a Prohibition to the Debitor to alienate in Prejudice of the *Debt*, or in Prejudice of the *Creditor*? I incline to the laſt. Upon which Suppoſition, the Inhibition, when aſſign'd, will not be available to the Cautioner, ſince it does not ſtrike againſt Alienations made to the Creditor himſelf. 'Tis a different Caſe, if the Cautionry Obligement was prior to the contracting of the heritable Debt; of which hereafter.

Let us, in the next Place, ſuppoſe a Cautioner, who has renounced the Benefit of Diſcuſſion by binding himſelf *conjunctly and ſeverally* with the Principal. And here, tho' the Cautioner is *directly*, yet not *equally* bound with the Principal. Therefore, by *Prop.* VII. as he has a total Relief, he ought to have a total Aſſignation. But if once we eſtabliſh the Obligation upon the Creditor to aſſign, it will follow by *Prop.* V. That he cannot thereafter contract with the principal Debitor directly or indirectly, to diſappoint the Cautioner's Relief. But there appears nothing to oblige the Creditor to aſſign againſt himſelf, to defeat any Right of his own, that was prior to the Acceſſion of the Cautioner. For ſince, in this Caſe, the Cautioner has not the Benefit of Diſcuſſion, he has nothing to found his Claim of Aſſignation upon, but the general Laws above laid down; and therefore this Caſe falls to be regulated by *Prop.* IV.

Poſſibly

Poſſibly it may not be thought an uſeleſs Piece of Curioſity to ſee this made out from other Principles. In all Caſes it carries ſtrong Conviction, when it is found, that different Principles coincide in the ſame Concluſions. The Principle of Law that leads me to this Point is as follows, That when different Perſons are bound to one another in mutual and reciprocal Obligements to a certain End, in every Thing they do with Relation to the Contract, they are bound to have in View the Support and Accompliſhment thereof. In other Words, the Law conſiders Perſons, ſo bound together, as in a *Society*, with Relation to their common Affair. And it is a Rule in Society, that every Member ought to act for the common Behoof. Thus a Purchaſer of Land buying in a collateral Right, cannot purſue a Warrandice againſt the Seller upon the Footing of Eviction; but muſt reſtrict his Claim to the Money he paid for the collateral Right, which is ſuppoſing it to have been bought in with a View to the common Intereſt. Thus a Wadſetter buying in a preferable Title to the Eſtate, is underſtood to do it for the joint Behoof of himſelf and Reverſer; and therefore cannot plead upon it againſt Redemption of the Lands. The ſame will be found to obtain betwixt a Creditor and a Cautioner who has renounced the Benefit of Diſcuſſion. For as to the proper Cautioner, his Benefit of Diſcuſſion, as above ſet forth, affords him more ample Security than he has by this Principle. To come to Particulars. If the Creditor adjudge, inhibit, or take any other additional Security, he is underſtood as carrying on a *commune negotium*, for the Behoof of himſelf and Cautioners. Which infers, that he ought to communicate ſuch

additional Security to the Cautioner performing his Part by paying the Debt. In which View it muſt be conſidered, when any additional Security is granted to a Creditor, as it is a Security for the Debt itſelf, of conſequence it muſt be a common Security, to all who are concerned as Cautioners, to ſee the Debt paid. All this proceeds from what is commonly called the *bona fides contractus.* And thus it is made out from the Nature of the Contract itſelf, that the Creditor is bound to aſſign his Debt and Diligence to the Cautioner upon Payment. It is a natural Conſequence from this, that if the Creditor diſcharge any additional Security, it operates Relief *pro tanto* to the Cautioner. Which being fix'd Law with us, is a Confirmation of this Doctrine. For it obviouſly ſuppoſes, that the Cautioner has an antecedent Right to demand Aſſignation, without which it would be nothing to the Cautioner, whether the Creditor diſcharge the additional Security or not. From the ſame Principle it follows, that a Creditor in a perſonal Bond with Cautioners, uſing Inhibition againſt the Debitor, and thereafter lending Money to the Debitor upon heritable Security, is bound notwithſtanding to aſſign his Inhibition to the Cautioner upon Payment, tho' againſt himſelf, becauſe the Inhibition is a common Security for the Debt, both to Principal and Cautioner; which Security the Cautioner cannot be defrauded of by any After-deed of the Creditors. And if a Creditor cannot diſcharge any additional Security *directly*, neither will he be allowed to do it *indirectly* by the Circuit of lending Money to the Debitor. It follows, 2*do*, That if the Creditor cannot ſafely lend to the Debitor after the

the Date of the additional Security, as little can he purchaſe in.

But now let us ſuppoſe the heritable Bond prior to the Acceſſion of the Cautioner. And let us alſo ſuppoſe it Law, that Inhibition does ſtrike againſt poſterior Alienations to the Inhibiter himſelf. In this Caſe there is nothing in this Principle at leaſt, why the Creditor ſhould be obliged to aſſign at all, far leſs to aſſign againſt himſelf. For tho' upon this Principle the Creditor is bound to aſſign to the Cautioner, who has renounced the Benefit of Diſcuſſion, whatever additional Securities were obtained after the Date of the cautionry Engagement, the ſame will not hold with Reſpect to anterior Securities, becauſe theſe cannot be regulated by the Laws of Society, being before the Society exiſted.

Another EXCEPTION we ſhall give is of three different Sort of Creditors upon the ſame Subject. 1*mo*, An Annualrenter or Annuitant. 2*do*, A Liferent Infeftment of Locality. 3*tio*, An Adjudger. One would readily think of reducing this to the common Caſe by conſidering the Liferent Infeftment as one Subject, the Adjudication of the Property as another, and the Annualrenter or Annuitant, as a preferable Infeftment over both. But when the Nature of an Annualrent, or Annuity is conſidered, this will be found a wrong Conception of the Matter. An Annualrenter or Annuitant ought firſt to draw his Payment out of the Fruits; and it is but by a ſubſidiary Right that he is entitled to claim the Property itſelf. This is obvious from the Action of poinding the Ground, the Stile of which carries the Poinder only to affect the Property, *failing* Moveables upon the Ground. In this View the

Rents ſtand as *principal Debitor*, the Ground only as *Cautioner*. From this Conſideration the Liferent Infeftment by Locality ought to be intirely burdened with the Annuity or Annualrent. There is no Place therefore for a proportional Allocation, and conſequently no Foundation for Relief.

But what if the Annualrenter or Annuitant ſuffer the Localiſt to uplift the whole Rents, truſting to his ſubſidiary Action againſt the Property. This plainly would be acting *arbitrarily*, by giving a partial Preference to the Localiſt: And therefore the Adjudger in this Caſe would be entitled, not only to a proportional, but to a total Relief againſt the Localiſt. And further, If theſe preferable Creditors ly out, and refuſe to intromet, I ſee no Reaſon why the Adjudger may not be entitled to uplift the Rents in their Name.

N. B. Here it is taken for granted, That as a Localiſt is a liferent Proprietor, ſhe can have on poinding of the Ground for any Inlacks of the Rents, more than an abſolute Proprietor can; and ſo theſe Inlacks are not a real Burden upon the Ground as the Inlacks of an Aunuity are. All the Remedy ſhe has is to adjudge the Fie upon her Warrandice, which will bring her in *pari paſſu* with other Adjudgers upon perſonal Rights. Let us now ſuppoſe, that ſhe has adjudged upon her Warrandice; but this will make no Difference, it will not bring on a proportional Allocation. The Annuity, or Annualrent continues ſtill a Burden upon the Locality; and all the Alteration is, that the Localiſt, upon her Warrandice, comes in among the other Adjudgers.

2*do*, What

2*do*, What if the Annuitant, or Annualrenter, actually aſſign to the Localiſt? If this was done ſubſequent to the Date of the Adjudication, it will avail nothing, ſee *Propoſition* V. unleſs perhaps it be allowed the Force of an Adjudication, to bring in the Localiſt *pari paſſu*, as if ſhe had adjudged upon her Warrandice. There is even a Scruple if this Aſſignation ſhould be ſuſtained, though of a Date prior to the Adjudication; becauſe it tends to cut out the perſonal Creditors, who reſt ſecure to adjudge *quandocunque* as long as no other Adjudication ſtands in their Way. But this Scruple is already obviated *Schol.* 1. *Prop.* I.

3*tio*, If the Annuity and Locality be veſted in the ſame Perſon before the Exiſtence of any other Right upon the Eſtate, the Poſſeſſion my be attributed to either to ſave both. This is clear from *Prop.* IV. And though the Matter ſhould be reckoned doubtful as to a Renunciation, which can never be a neceſſary Deed when granted to a Localiſt, who has not Power like a Creditor to uplift, there can be no Dubiety when the Localiſt purchaſes the Annuity, *& e contra*; becauſe there is no Reaſon ſuch Commerce ſhould be diſcountenanced.

This is all to be underſtood of an Annuity and Locality concurring for the ſame Years: But if there be prior Annuities due before the Commencement of the Liferent Right, theſe cannot be ſaid to be a natural Burden upon every Year's Fruits falling due to the Liferenter, as the yearly Annuities are; and therefore the Creditors cannot force the Annuitant to draw them out of the Rents. As little can they be reckoned a proper Burden upon the Fie conſidered excluſive of the Liferent; but they ought rather to be conſidered as a catholick Burden, and the

Life-

Liferent and Fie as two ſeparate Eſtates ſubject to them; and therefore to be drawn *proportionally* out of each, *i. e.* upon a Sale they are to be paid out of the firſt End of the Price, the Remainder thereof to go to the Localiſt in Liferent, and the Adjudgers in Fie.

Another EXCEPTION is as follows. Let us ſuppoſe the Locality the preferable Right. 2*do.* The Infeftment of Annualrent or Annuity. 3*tio*, The Adjudger. At the ſame Time let us ſuppoſe, That the Liferenter conſents to the poſterior Annualrent-right; by Virtue of this Conſent the Annualrenter will be preferable. Has the Localiſt in this Caſe a *total*, or only a *proportional* Relief againſt the Adjudger? The Anſwer is, She has a *total* Relief; becauſe the Conſent here is private betwixt the Annualrenter and Localiſt, and can operate nothing in Favours of the Adjudger. Beſides, there is implied in the Conſent an Obligation upon the Annualrenter to keep the Localiſt *indemnis*, ſo far as conſiſtent with his own Intereſt: Therefore what the Annualrenter upliſts in this Caſe is underſtood as in Name of the Localiſt, and he takes the Rent not as in Payment of his own Claim, but as Money received from the Localiſt for the Purchaſe of his Right; which therefore he is obliged to aſſign ſo far as he receives. Thus the Paction is not extended to be a *direct Preference* to the Annualrenter, but interpreted to be only an *Obligation* upon the Localiſt to communicate her Rents to him, or, which is the ſame, to allow him to uplift in her Name. And ſo it was found. *Home*, 17. *February* 1727, Competition Lady *Ludquhairn* with her Husband's Creditors. But what if ſuch Conſent were *abſolutely* conceiv'd,

would

would not this bring it to the former Caſe, as if the Annualrenter were ſimply preferable?

To compleat this Eſſay, it will be proper to look into the Deciſions of our Court of Seſſion, and to examine how far they have followed or varied from the Principles here laid down. They are as follow,

An Annualrent being payable out of two Tenements which came afterwards into the Hands of different ſingular Succeſſors; it was found, That the Annualrenter might uplift the whole out of any one of the Tenements, aſſigning againſt the other for Relief. *Stair* 26th *June* 1662, *Adamſon* contra Lord *Balmerino.* This is an Example of the firſt Propoſition.

A Cautioner upon Payment craving Aſſignation againſt his Co-cautioner, the Lords found the Creditor not obliged to aſſign, the Cautioner being ſufficiently ſecured in Law by his Action for Relief. *Newbyth, Stair* 10th *July* 1666, *Home* contra *Crawfurd.* In this Caſe tho' hard to deny Aſſignation, yet the Diſpute perhaps was of little Importance, ſince the Relief that was competent might be as effectual.

In a Competition an Adjudger ſubjected to an Inhibition offering to purge by Payment of the Debt; the Creditor was found obliged to aſſign his Inhibition, but not in ſo far as it might be prejudicial to other Debts in his Perſon. *Stair* 19th *July* 1672, *Chieſly* contra *Hay.* The like, *Stair* 11th *February* 1676, *Bruce* contra *Mitchel.* Theſe Deciſions are defective in ſo far as they do not mention, whether the Inhibiters ſecondary Debt was of a Date prior or poſterior to the Adjudication. If prior, the Deciſions are founded in *Prop.* III. If poſterior the Relief ought to be proportional *per Prop.* IV.

A Creditor being preferable over two Tenements and a ſecondary Creditor having a Right only over one

of

of them, in that Situation the preferable Creditor for a ſeparate Debt adjudg'd both Tenements; it was found, That the Catholick Creditor was not obliged to diſpone to the ſecondary Creditor in Prejudice of his Adjudication exiſting before the Date of the Proceſs. *Stair* 6th *Nov.* 1678, *Miln* contra *Hay.* By this Deciſion and ſome others to be mentioned hereafter, it ſeems to be eſtabliſhed, that the Catholick Creditor is in Safety to lend upon the Tenement *B*, before he be interpelled by *Proceſs* at the Inſtance of the ſecondary Creditor upon *A.* It will undoubtedly be allowed, that if he is interpelled by *Intimation*, as is above propoſed, the Effect would be the ſame. By theſe Deciſions then we may reckon it as eſtabliſhed, that Intimation is neceſſary to interpel the catholick Creditor, without which he may ſafely lend upon the Tenement *B*, though in Prejudice of the ſecondary Creditor upon *A*; and this in ſome Meaſure ſuperſedes the Neceſſity of making an Act of *Sederunt* to that Effect.

It may further be remarked upon this Deciſion, That if the Bond upon which Adjudication paſt, was prior in Date to the Notification of the ſecondary Creditor's Infeftment, upon that Suppoſition the catholick Creditor was not at all bound to aſſign, *Argum. Prop.* III. becauſe though he might be *in mala fide* to lend upon *B*, after he knew of another Debt upon *A*; yet not to adjudge upon a prior Debt, that being *neceſſitatis* not *voluntatis.*

Similar is the Caſe obſerved by *Fountainhall*, 3*d January* 1696, *Scotland* contra *Bairdner*, where in a Competition betwixt a Liferentrix, who only had her Liferent upliftable out of the half of the Subject, and a Creditor whoſe Infeftment affected the

the whole, and was prior to that of the Liferentrix, and who had alſo an Adjudication, but poſterior to the Liferent Right; ſhe craving, that he might be decerned to aſſign her as to one half, in regard the other was ſufficient to pay him his Annualrent: The Lords thought, that if he acquired any ſuch Adjudication leſs preferable *poſt litem motam*, he might be reputed *in mala fide* to make Uſe of ſuch Right to impede his aſſigning to the Liferentrix; but if he had got it before, then there was no Law hindring him to do the ſame, and to cover it by his better Right; and ſo the Lords refuſed to decern him to aſſign the Liferentrix againſt the other half, in Prejudice of his Adjudication. Here again the Neceſſity of Intimation is enforced.

An Aſſignation to ſome Goods by a Bankrupt to his Creditor in Security and Payment, being reduced upon the Act 1696 by another Creditor, and the Reducer at the ſame Time arreſting in the Aſſigney's Hands, and purſuing a Forthcoming; the Aſſigney was contented to make the Goods forthcoming, but craved Aſſignation from the Purſuer to his cumulative Security by Adjudication, in ſo far as he ſhould pay, that ſo he might operate his Relief out of the common Debitor's Effects *pro tanto*; The Lords found this relevant, and ordained the Purſuer to aſſign, but with this expreſs Quality, That the Purſuer ſhould be preferred *quoad* his Debt, and the Aſſigney ſhould not compete with him for the ſame. *Fountainhall, Forbes* 19. *December* 1705, *Reid* contra *Man.* This Deciſion is certainly well founded. There can be no Pretence for obliging a catholick Creditor, who gets Payment only of a Part of his catholick Debt, to aſſign in Proportion to that Payment, which may tend in ſome Meaſure to reſtrict

his Claim for the Remainder. 'Tis fair in ſuch a Caſe, if he aſſign at any Rate.

A Creditor by Bond, wherein three Perſons were bound as Co-principals, being the firſt Arreſter of a Subject, belonging to one of his Debitors, was not found obliged to aſſign his Bond to the other Arreſters, for recovering of the other two Co-principals the Superplus paid to him, out of the common Debitor's Effects, more than his third Share, altho' Relief of two Thirds was competent to the common Debitor himſelf againſt theſe Co-principals. For this Reaſon, That the Creditors poſtponed might affect the ſaid Relief by Diligences. *Forbes* 24. *February* 1708. *Kennedy* contra *Vans* and *Crawford*. This Deciſion is one of very few that are not eaſie to be adjuſted to Principles, running contrary to the primary Law of a proportional Allocation. It appears obvious, That the *ratio decidendi*, which may poſſibly be the Obſerver's, is by no Means concluſive. For if Aſſignation is never to be granted, where the Creditor craving Aſſignation has otherwiſe Action competent againſt the Perſon or Subject; it will follow, that Aſſignations ſhould never be granted in any Caſe. At that Rate, in the known Caſe of a catholick Right over two Tenements belonging to the ſame common Debitor, and a ſecondary Right over one of them; the ſecondary Creditor could not ſeek Aſſignation againſt the other Tenement, becauſe he might affect it by Diligence. And it is remarkable, That the Deciſions, as handed down to us, run ſo croſs to one another, that ſometimes it has been ſuſtained as a good Reaſon for denying Aſſignation, that the Subject deſigned to be affected, in vertue of the Aſſignation, did not belong to the common Debitor;

and

and consequently was not otherwise to be come at, but thro' Aid of the Assignation. See below, *Forbes* 29. *June* 1714. *Ker* contra Creditors of *Harden.* But now, what if another Creditor of the common Debitor's has *ab ante* affected this Relief? The Answer is, That it will signifie nothing. For, let us make a Supposition, which is exceeding rational, That the catholick Creditor had drawn his Payment equally from the three Co-obligants; upon that Supposition, as there would be no Foundation for Relief, the Creditor who had affected it could draw nothing. It can make no Difference, that the catholick Creditor chuses to draw his Whole from one. The very Design of an Assignation, is to remedy this Inequality; and to put all Things upon the same Footing, as if he had drawn *equally* and *proportionally*, which every catholick Creditor is supposed to do, when the Question is anent Relief, competent to secondary Creditors among themselves.

A Party having two Infeftments of Annualrent, one prior and another posterior to the Infeftment of another Creditor, whose Infeftment was only of a Part of the Lands, he, who had the first and third, being infeft in the whole, and taking up his Annualrent out of that Part only, wherein the other stood infeft, whereby that other was disappointed; and therefore craved in a Process, to be assigned to a Proportion, *&c.* The Lords found, That where a posterior Creditor pays a prior out of his own Money, he has a Title to demand Assignation; but if he leaves him to get his Payment out of the Debitors Means, the catholick Creditor is not obliged to assign but with a Quality and Reservation, that it shall not prejudice his other Debts and Rights, tho' posterior to the Party's Right, who craves the Assignation.

ſignation. *Fountainhall, Forbes* 21. *December* 1710, *Pitcairn* contra *Halliday*. This is directly oppoſite to Propoſition IV. unleſs it be ſaid, that there is here no Appearance, that the catholick Creditor was acquainted with the interjected Creditor's Debt. If this be underſtood, as the *ratio decidendi*, it tends to fortifie the Doctrine above laid down, anent the the Neceſſity of Intimation.

Brigadier *Preſton*, Purchaſer of the Eſtate of *Valleyfield* at a publick Roup, offered to the Lords a Scheme for drawing the Price, wherein it appeared, that he had Right to ſome Debts, preferable over the whole Eſtate, and to others preferable over particular Parcels: And pretending to exhauſt the remanent Price of the ſeparate Parcels, affected by his catholick Debts, in order to bring in the other Debts purchaſed in by him, preferable, as ſaid is, upon particular Parcels. This was oppoſed by Colonel *Erskine*, who alledged, that the catholick Debts, preferable upon the whole Eſtate, ought to be taken out of the whole Head of the Price, whereby the Price of every particular Parcel of the Eſtate would be diminiſhed proportionally; and he, the Colonel, of Conſequence, would draw ſome Share of the remanent Price; whereas, by the Brigadier's Scheme, he was intirely excluded. The Lords found, the Brigadier might exhauſt the Price of any Part of the Eſtate, by his ſovereign Rights affecting the whole; and that he might make the beſt Uſe he could of his Rights, providing the ſame were not *acquired*, or made uſe of *in emulationem* of the Colonel. *Bruce.* 22. *February* 1715. Brigadier *Preſton* contra Colonel *Erskine*. Here the Fact is not diſtinctly laid down, whether the Purchaſes made by the Brigadier, of his ſecondary Rights, were prior or poſterior to the

the Exiſtence of thoſe belonging to the Colonel. If prior, the Deciſion is agreeable to the Corrollary of Prop. III. otherwiſe if poſterior; unleſs it be put upon the Footing, that Colonel *Erskine* gave no Intimation to the Brigadier of the Exiſtence of his Rights. And the Proviſion at the Cloſe of the Interlocutor ſhews plain enough the Opinion of the Court, as to this Matter: For after ſuch Intimation, any ſecondary Rights purchaſed in by the Brigadier, who was catholick Creditor, muſt undoubtedly be deemed, *to be acquired and made uſe of* in emulationem *of the Colonel.*

A Creditor ranked in the ſecond Place did after the Ranking purchaſe in the preferable Debt, and having theſe two Rights in his Perſon, he became Purchaſer of the Eſtate at a publick Sale, and gave Bond for the Price payable to his Creditors as they were ranked. The preferable Debt purchas'd in by him, as ſaid is, did not only reach over the Lands purchas'd by him at the publick Roup, but alſo over a ſeparate Subject belonging to another. The Fact was, That the Price of the Lands ſold publickly was but ſufficient to anſwer the preferable Right; and therefore the Purchaſer, willing to bring his ſecondary Claim within the Price, craved Payment of his preferable Right intirely out of the ſeparate Subject; which the Lords refuſed, and found, That the ſaid Debt, being in the Perſon of the Purchaſer of the Lands upon which it was ranked *primo loco*, which Purchaſer granted Bond for Payment of the Price to the Creditors as ranked, the ſaid Debt became *eo ipſo* extinguiſhed *confuſione*, and could not revive to be a Charge upon the ſeparate Subject. 13th *June*, 1729. Competition betwixt Mr. *Henry Ramſay* and the *Bank of* SCOTLAND. In this Caſe

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it is clearly laid down, that after Intimation, by Proceſs, of a ſecondary Right, the proportional Relief will obtain, tho' the preferable and any other ſecondary Right ſhould come into the ſame Perſon. When the Matter is brought here, it will follow, that any legal Intimation is ſufficient. For it would be ridiculous to impoſe the Neceſſity of raiſing a Proceſs, when there is nothing elſe in view but to intimate a Fact to the Defender. Thus then we may hold it as an eſtabliſhed Point in our Practice, that the Catholick-creditor may renounce his Right upon the Tenement *A*, lend a ſecond Debt upon that Tenement, or purchaſe in a Debt upon it at any Time without being oblig'd to ſearch the Regiſters, until actual Intimation be made to him of a ſecondary Right upon the Tenement *B*.

Robert Scot ſerv'd Heir in general, and confirm'd Executor *qua* neareſt of Kin to Sir *William Scot* of *Harden*, conveyed all Subjects heritable and moveable that he had Right to by theſe Titles to *Ker* of *Chatto*. Some of Sir *William*'s real Creditors infeft in his Land Eſtate having alſo affected by Diligence their Debitors other Effects, conveyed, as ſaid is, to *Ker* of *Chatto*, were in a Competition preferred to the Diſponee; *Ker* thus excluded by the preferable Creditors, demanded Aſſignation to their Debts and Diligence in order to affect the real Eſtate. It was anſwered for the Creditors, That no Perſon is intitled to demand Aſſignation, unleſs againſt his own Debitors Effects. The Lords found, That in ſo far as Sir *William Scot*'s Creditors are either paid out of his Eſtate, or out of his other Effects, they are not bound to aſſign their Debts and Diligences in Favours of *Chatto*, *Forbes* 29. *June* 1714, *Scot* contra *Ker*. That this Deciſion is re-

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concileable with the Principles above laid down, I ſee not, unleſs we take a ſeparate Circumſtance into Conſideration, tho' not at all laid hold upon by the Collector. Sir *William Scot* had tailied his Land Eſtate with ſtrict prohibitory and irritant clauſes. Now tho' this could not ſave the Eſtate from his own Debts, yet it may infer a very natural Preſumption, That Sir *William* intended his ſeparate Funds ſhould go in the firſt Place for Payment of his Debts. If this be well founded, the Deciſion is extreamly juſtifiable; for the ſeparate Funds to which *Robert Scot* ſucceeded upon his Confirmation and general Service, have been conſidered as the principal Debitor, and the tailied Eſtate as Cautioner only; and therefore in this View, it had been wrong done by the Creditors to aſſign againſt the tailied Eſtate, had they been ever ſo willing.

In the Year 1685, *M'Guffoc* of *Ruſco*, Heritor of the Lands of *Borgue*, granted an heritable Bond for the Sum of 2000 *lib.* out of the ſaid Lands in Favours of *Irving* of *Logan*, whereupon the Creditor was inſeſt the ſame Year. Thereafter the ſaid *Ruſco* granted a Diſpoſition of the Lands of *Borgue* in Favours of his ſecond Son *David Blair*, reſerving a Faculty to alter; but which Faculty he afterwards renounced in his Son's Contract of Marriage. *M'Guffoc* of *Ruſco* being overcharged with Debt, in the 1727 his Eſtate was brought to a Sale; and the ſaid *Irving* of *Logan*, who had adjudged all his Debitor's Lands for the above mentioned Debt of 2000 *lib.* was ranked as a preferable Creditor: And upon his drawing Payment, it was demanded by the other

other Creditors, that he ſhould aſſign them to his Inſeſtment upon the Lands of *Borgue*, according to the general Rule in theſe Caſes, that who has a preferable Inſeſtment in two different Subjects for the ſame Debt, if he chuſe to draw his whole Claim out of one, is obliged to aſſign to the Creditors poſtponed, to afford them a proportional Relief out of the other Subject. This was oppoſed by the Relict and Children of *Borgue*, upon this *medium*, That by *Ruſco*'s Diſpoſition to his ſecond Son, and After-conſent in that Son's Contract of Marriage, he became bound to warrant the ſaid Lands; the Conſequence whereof is, that had *Irving* of *Logan* drawn his whole Sum out of their Lands, they muſt have been intitled to demand Aſſignation againſt *Ruſco* bound to them in Warrandice, juſt as much as a Creditor who takes Payment from a Cautioner is obliged to aſſign him againſt the principal Debitor. Anſwer'd, *Ruſco* was never bound to warrand his Son *David* and his Heirs againſt *Logan*'s Debt. The Diſpoſition was under a reſerv'd Faculty, to contract Debt, alter and diſpoſe of the Eſtate, *&c.* and conſequently the Debt already contracted, could be no Contravention of the Warrandice; and ſuppoſing the Son had paid the Debt, he could never have diſtreſſed his Father for the ſame; and conſequently an Aſſignation would have been fruitleſs and ineffectual. Nor does the Father's After-conſent in his Son's Contract of Marriage, which implied a Renunciation of his Faculty any way alter the Caſe: For by no Interpretation can this be drawn to import an Obligation upon the Father to warrand or relieve his

Son

Son of the foreſaid Debt. The Lords refuſed the Aſſignation. *January* 1729. Competition betwixt the Creditors of *Ruſco* and the Relict and Children of *Blair* of *Borgue*. This Deciſion runs directly counter to the Principle of a proportional Allocation. There may occur ſome Difficulty in adjuſting the real Relief in this Caſe; which will be ſolv'd by comparing this Caſe with that abovementioned of a Catholick Adjudger of two Tenements; Another Adjudger within Year and Day upon the Tenement *A*; a third without Year and Day upon the Tenement *B*. Here the Lands of *Borgue* ſtand for the Tenement *B*, and *David Blair* Proprietor thereof for the Adjudger without Year and Day.

Mrs. *Dalgleiſh*, Creditor to Earl of *Roſeberry*, arreſted the Rents of his Eſtate in the Tenants Hands, as alſo a perſonal Bond of his in the Hands of Mr. *John Alves* the Debitor. Thereafter the ſame Rents were arreſted by *Blair* another Creditor, who by Decreet of Furthcoming was preferred *ſecundo loco* on that Subject. Laſt of all the common Debitor granted Aſſignation of Mr. *John Alves*'s Bond for onerous Cauſes to *Archibald Robertſon* Merchant in *Edinburgh*. This Aſſignation obliged the Debitor in the Bond to raiſe a Multiply-poinding, wherein the Arreſter was preferred to the Aſſigney. This gave Occaſion to *Robertſon* the Aſſigney, whoſe Subject was thus carried away by the Arreſter, to demand an Aſſignation to the Arreſter's Debt and Diligence, in order to operate his Relief out of the other Subject affected thereby, *ſciz.* the Rents of the Eſtate in the Tenants Hands. Againſt that Demand *Blair*, the ſecond Arreſter of that Subject, appeared for his Intereſt. It was pled for him, That the common

Debitor could not put the Arreſter in a worſe Situation by granting Aſſignation to *Robertſon*; And therefore that he is intitled to a total Aſſignation, as if the Aſſignation had not been granted. It was anſwered, That the common Debitor remained Fiar of the Bond juſt as much after *Blair*'s Arreſtment as before, the Arreſtment not affecting the Bond; and therefore his Aſſignation to *Robertſon* was valid and effectual in Law; and did infer an Obligation upon the Catholick-creditor, chuſing to draw his Payment out of a Fund that now no longer belonged to his Debitor, to aſſign for a total Relief; which Obligation was infer'd from the Principles of Remuneration. To this it was replied by the ſecond Arreſter, That the Bond, being affected by the preferable Arreſtment, was made litigious; and therefore was ſtill to be conſidered as remaining in the Perſon of the common Debitor. The Lords found, that Miſtreſs *Dalgleiſh* was not obliged to aſſign to the Aſſigney *Robertſon* in Prejudice of *Blair*'s Arreſtment. 12th *June* 1730. Competition betwixt *Robertſon* and *Blair*. This is directly oppoſite to *Prop.* II. But it is to be obſerv'd, that here *Robertſon* was inſiſting for a total Aſſignation. Poſſibly had he reſtricted his Claim to a proportional Aſſignation, he would have had a more favourable Hearing.

George Gordon lent 1000 Merks upon Bond conjunctly and ſeverally to *Kincaid* and *Suttie*, *Kincaid* got the Money, and gave *Suttie* a Bond of Relief. Upon this Bond, after the Term of Payment, Diligence was done by Horning and Inhibition. Thereafter *Kincaid*, *Suttie* and *Johnſton* conjunctly and ſeverally granted Bond of Corroboration, containing a Clauſe obliging the other two to relieve

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Johnſton as their Cautioner. *Johnſton* after this, and after Exiſtence of the Inhibition, lent *Kincaid*, the common Debitor, 100 *lib. Sterl.* by an heritable Bond. Laſt of all the ſaid *Johnſton* paid the Debt wherein he was Cautioner, and took from *George Gordon* the Creditor, Aſſignation to the Debt and Diligence, and inſiſted againſt *Suttie* for Relief. In this Proceſs the Queſtion occur'd, Whether *Johnſton* was bound to aſſign the Inhibition to *Suttie* upon Payment? *Johnſton* pled, That the Inhibition ſtrikeing againſt his heritable Bond, the Law did not oblige him to aſſign againſt himſelf. *Suttie* contended, That this Rule holds not betwixt Cautioners who ſeeking Relief off one another, are bound in ſtrict Law from the Nature of the Contract to aſſign. The Lords found no Neceſſity upon *Johnſton* to aſſign the Inhibition. 12th *November* 1730. *Johnſton* contra *Suttie*. To examine this Caſe by the Laws above laid down, we ſhall in the firſt Place take up the Queſtion, as if *George Gordon* the Creditor in the Bond with Inhibition, had alſo been the Lender of the poſterior heritable Bond, and as *Johnſton* were not in the Field. In this Caſe, according to the plaineſt Principles, *Suttie* paying the Debt, would be intitled to demand Aſſignation to the Inhibition, tho' excluſive of the heritable Bond. See *Page* 40. 'Tis another Queſtion, how far the Inhibition would in this Caſe be ſerviceable when aſſigned; but this comes not in in a Caſe like the preſent, where the heritable Bond was granted to another than the Inhibiter. Continuing ſtill the Suppoſition, That *Gordon* was Creditor in both Bonds, let us draw a little nearer to the preſent Caſe by taking in the Conſideration of the Bond of Corroboration, wherein *Johnſton* acceded as Cautioner.

Here *Johnſton* paying the Debt, would have Right to demand Aſſignation to the Inhibition. And when he is ſeeking Relief off *Suttie*, 'tis as evident he muſt transfer the Debt and Diligence to him, in order to operate his Relief againſt the principal Debitor. For if he acts as Creditor, the Thing is apparent; if as Cautioner upon the Clauſe in the Bond of Corroboration, it will come to the ſame: For if a Creditor be bound to aſſign upon Payment, *multo magis* a Co-cautioner who has a Bond of Relief. To come cloſe to the Caſe in Hand, if *Gordon* was bound to aſſign to *Suttie* even againſt himſelf, tho' he had been Lender of the heritable Bond, he cannot put him in a worſe Situation by chooſing to take his Debt from *Johnſton*. And *Johnſton*, who comes in *Gordon*'s Place by the Aſſignation, cannot be in a better Situation than *Gordon* himſelf would be, had he been the Lender of the heritable Bond. To take this Matter in the neareſt View, *Gordon*'s Inhibition became an additional Security for the Debt, for the Benefit of himſelf and all the Cautioners. Therefore whichever Cautioner was burdened with the Debt had a Right to the Inhibition in order to operate his Relief againſt the principal Debitor; and thereupon was intitled to reduce every Deed poſterior to the Inhibition in whoſe-ever Favours granted.

Vinco Vincentem.

IN the Eſſay upon the *Beneficium cedendarum actionum*, we have endeavoured to lay down, after what Manner Creditors catholick and ſecondary are to draw their Payment from the ſeveral Perſons, and out of the ſeveral Subjects burdened with their Debts. The Deſign of this Eſſay is to lay down ſome Rules for extricating the Preferences of Creditors and Diſponees competing upon the ſame Subject. In the firſt Eſſay the Queſtion is, Having given the Order of Preference, to determine the Method of drawing Payment out of the different Funds, and from the different Perſons liable in the Debts. In this the Queſtion is, Having given the Fund to determine the abſolute and partial Preferences, and what each Competitor ſhall draw?

For Method's Sake, we ſhall firſt take under Conſideration the Competition of Creditors among themſelves. Theſe ſtand *limited* and *reſtricted* according to the Extent of their Claims. After diſcuſſing which, the Competition among Diſponees, *&c.* fall in, whoſe Claims, upon the Subject contraverted, are from their Nature unlimited, and totally excluſive of others.

In

In the Preferences that ariſe ſimply from Priority of Time, there can ariſe no Dubiety among competing Creditors. *Potior tempore, potior jure,* is a Rule upon which Preferences may be as eaſily determin'd, as it is to determine, that this Year, this Hour, this Day is poſterior to the laſt. The Difficulties that ariſe proceed from partial Grounds of Preference, that one Creditor obtains againſt another, whereby it happens, that he who is poſterior in Time, ſhall ſometimes exclude and be preferred to one, or another that is prior. To give an Example. Suppoſe three Annualrenters, *A*, *B*, *C*, all in Order of Time, ſuppoſe at the ſame Time *A* conſenting to *C*'s Preference: In this Caſe *A* is preferable to *B*, *B* to *C*, and *C* again to *A*: *A* to *B*, and *B* to *C*, by Priority of Time, and *C* to *A*, by the Conſent. In Caſes of this Nature, if the Debts exceed the Fund, it will be found no eaſy Matter to adjuſt what every Creditor ſhould draw.

Before we come to the Point, it will be neceſſary to conſider the Force and Effect of the Conſent that the laſt Creditor has obtained from the firſt. This Conſent muſt be conſidered in one of two Views. 1*mo*, As giving the Right conſented to, all the Benefit of the Contenter's Diligence; that is, interpreting the Conſent as a *virtual Aſſignation.* Or, 2*do*, As giving it only a *Preference*, ſo as to intitle the Creditor conſented to, to draw as if the Conſenter were not in the Field. This laſt is the true Meaning of the Conſent, and all the Force that the Law allows it; and which indeed is the only View in which the Matter can be attended with any Difficulty. For if the Conſent be underſtood as a *virtual Aſſignation*, there can be no Colliſion betwixt the firſt and laſt Creditor, the Rule

prior

prior tempore potior jure will be ſufficient to extricate the whole.

Taking then the Conſent as a *Preference*, not a *virtual Aſſignation*, the Method that naturally caſts up to adjuſt theſe Preferences, appears to be this. Let the Creditors be ranked upon the Subject according to their *real* Preferences, *A* in the firſt Place, *B* in the ſecond, *C* in the laſt. Theſe are the Places that naturally belong to them in virtue of their Diligences. This Step being taken, it falls next to be conſidered, what *partial* Grounds of Preference any Creditor has againſt another. In this Caſe, the only partial Ground is the Conſent, whereby *C* is intitled to draw, as if *A* were not in the Field. To adjuſt this Preference, let us ſuppoſe the Fund 6, and each of the Debts 4; in adjuſting the *real* Ranking, *A* draws 4, *B* 2, *C* nothing. *B* keeps his 2; this he is intitled to by the *real* Ranking, not being concerned with the *partial* Preference, that occurs only when the Queſtion is betwixt the other two Creditors. Let us next conſider the Effect of this *partial* Preference, which intitles *C* to draw, as if *A* were not in the Field. When this Calculation is made, *C* will be found intitled to draw only 2; ſo that upon the whole *B* draws 2, *C* 2, and *A* 2.

This appears to be the natural Method for adjuſting Preferences among Creditors, who have perſonal Challenges or partial Grounds of Preference againſt one another. To clear the Matter ſtill further, it will be proper to obviate what Objections may ariſe. According to this Method, it is obvious, that *A* the Conſenter is in a better Situation, than if *B* were not in the Field; This may appear ſtrange. It may be thought when *C*

is

is claiming the Benefit of *A*'s Conſent, that he ought to draw the whole 4, ſeeing it is *jus tertii* for *A* to plead upon the Right of *B*; which he does, when *C* is reſtricted to draw only 2. As this indeed ſeems to have the Air of an Objection, a ſolid Anſwer may tend ſtrongly to inforce this Scheme. To obtain perfect Satisfaction, we need but look into the Circumſtances of the Parties, and Nature of the Tranſaction. *C* about to lend his Money, ſees two real Creditors upon the Subject. He is unwilling to lend upon that Security, unleſs he obtain *A*'s Conſent to his Preference. He ſees at the ſame Time *B* preferable, but that he takes his Hazard of, he is willing to lend under that Diſadvantage. All therefore he can pretend to draw, even after *A*'s Conſent, is what remains of the Fund unpreoccupied by *B*. This is all the real Security he has to depend upon, and all he ought to draw in the Diviſion of the Fund or Price thereof. When therefore in the Queſtion betwixt *C* and *A*, upon the Conſent, *B*'s Right is brought under Conſideration, it muſt not be taken in this Light, as if *A* were founding any Preference upon it; it is pled upon only to determine, how far the Conſent ſhould operate. The Law ſays, That ſuch a Conſent is not a *virtual* Aſſignation, it means no more, but to allow the Creditor conſented to, to draw as if the Conſenter were not in the Field. To make this Calculation, it is plain, that *B*'s Intereſt muſt be taken into Conſideration: And therefore, according to the Example above laid down, when *C* draws 2, all the Fund that remains unpreoccupied by *B*, he draws the whole that was intended him by the Conſent. This Argument is drawn from the Meaning of the Conſent, and it is ſolid. However, it will be neceſſary

ceſſary to give another Anſwer ſufficient to reach all the Caſes of partial Preferences, as well as that by Conſent. And this will ariſe from conſidering the Nature of the Objection *jus tertii*. In the Eſſay upon that Subject, it is laid down, *Poſition* VI. That one is ever allowed to found upon the Right of a third Party, when the Concluſion tends to reſtrict or annul the Right of his Antagoniſt. Thus, ſubſtituting an Inhibition in Place of the Conſent, when the third Creditor Inhibiter comes to claim his Preference, he draws juſt 2 as the Right conſented to did; becauſe, all that the Inhibition or Conſent can operate is to ſtrike out *A.*; And when that is done, all that remains to them unpreoccupied by *B* is 2. And tho' *B* himſelf draws but 2 in Competition with *A*, yet *A* can found upon *B*'s Right to reſtrict *C* to 2; ſince it is not claiming a Preference upon *B*'s Right, but uſing it as an Argument to reſtrict *C*'s Right. And truly the Argument is concluſive. Were *C* allowed to cut out *A* of his whole Claim, without ſuffering any Reſtriction upon Account of *B*'s Claim, it would follow, that an Inhibition, which is only underſtood a Ground of *Preference*, muſt really and ſubſtantially be a *virtual Aſſignation*, ſo as to put the Inhibiter in the inhibited Perſon's Place, and to intitle him to draw, not only in his own Right, but in Right of the Perſon inhibited, which is directly contrary to the Nature of an Inhibition.

It may poſſibly be urged further upon this Point, Why ſhould it not be reckoned *jus tertii* for *A* to found upon *B*'s Right, in order to reſtrict *C*, as well as it is for *C* to found upon *A*'s Right, in order to reſtrict *B*? Now if *C* could found upon *A*'s Right in order to reſtrict *B*, the Scheme would come out

thus. By Means of the Reſtriction *B* drawing but two, there would remain four unpre-occupied to be drawn by *C*. In Anſwer to this, let it be conſidered, that the *jus tertii* cannot lie both Ways. If it be *jus tertii* for *C* to build upon *A*'s Right, in order to reſtrict *B*, it cannot be *jus tertii* for *A* to found upon *B*'s Right, in order to reſtrict *C*; theſe being directly contradictory Poſitions; the one terminating in a virtual Conveyance, the other only in a Preference, which is the true Conception of the Matter. But more directly the Difference comes preciſely here. *A*, as above laid down, may found upon *B*'s Intereſt, to cut down *C*; why? Becauſe the neceſſary Conſequence is to prefer himſelf, or, which is the ſame, to relieve himſelf of a Burden. But to what Purpoſe is it that *C* would found upon *A*'s Intereſt? 'Tis true, *A* is preferable to *B*; but no Concluſion can be drawn from that to *C*'s Advantage, it neither tends to profit *C*, or to relieve him of any Burden. Thus in Competition with *A*, *B* can only draw two; but it will not follow that four remains for *C*, becauſe 'is perfectly conſiſtent, that *B* draw four in Competition with *C*, though he draw only two in Competition with *A*.

I have choſen the partial Preference that ariſes from Conſent, as the plaineſt and ſimpleſt Caſe, to illuſtrate and clear this Subject. But what is laid down here will apply to all the other Grounds of partial Preference, Inhibitions, *pari paſſu* Adjudications, *&c.* All of which operate a *Preference*, not a *virtual Aſſignation.*

The Rule then comes out thus, firſt to rank all the Creditors according to the Priority of their Diligences, without reſpecting the partial Grounds of Preference any one may have againſt another. By this

this firſt Operation will be aſcertained the Claims of theſe Creditors who ſtand free of Challenge. In the next Place, to adjuſt what will fall to any Creditor, in Virtue of partial Grounds of Preference, the Operation muſt go thus. Strike out the Creditor againſt whom the partial Ground of Preference is directed; what remains of the Fund unpre-occupied by the other Creditors not ſtruck at, belongs to the Creditor Obtainer of the partial Preference.

It need hardly be qualified here, that for what is drawn from the firſt Creditor *A*, by Virtue of the Conſent or Inhibition, he cannot recur againſt *B*; that would carry this Abſurdity, to make the Inhibition or Conſent virtually operate againſt *B*, tho' intended only againſt *A*. *B*'s Annualrent, ſecond in the Order of Time, entitles him to take up the ſecond Place; this is his Situation, let *A* and *C* adjuſt their Preferences in the beſt Shape they can. If *C* thurſt out *A*, that entitles not *A* to thurſt out *B*: He muſt be ſatisfied to take up *C*'s Place. But it is proper to be obſerved, That it will make no Difference as to this Scheme, whether the partial Ground of Challenge be conſidered as operating a direct Preference, or only a perſonal Claim, or Ground of Reduction. For, taking the Matter in either Shape, the Creditor who has the Ground of Challenge, muſt ſtill be entitled to draw, as if the Debt againſt which the Challenge lies, were not in the Field. This Obſervation ſuperſedes intirely the Neceſſity as to this Point of diſputing, whether an Inhibition give a direct Preference, or be only a Ground of Reduction? Which poſſibly may be a Queſtion not eaſily determined from the Nature of that Diligence.

Let us illuſtrate this Doctrine by another Example. The firſt we ſhall give is out of the *Ro-*

man Law. The *ſpecies facti* is this; a Perſon borrows Money and for Security gives a Hypotheck, which the Creditor neglects to regiſtrate. Thereafter the Debitor becomes a Tutor, whereby, by the *Roman* Law, his whole Goods become hypothecated to the Pupil. Laſt of all he borrows another Sum, and gives another conventional Hypotheck, which the Creditor regiſtrates. What gives Occaſion to the Difficulty here, is a Conſtitution whereby conventional Hypothecks regiſtred, are preferred to theſe not regiſtred. Whence the unregiſtred Hypotheck is preferred to the Legal, and the Legal to the Regiſtred by Priorty of Time. (For a legal Hypotheck need not be regiſtred ;) the regiſtred Hypotheck again is preferred to the unregiſtred. Let us as before ſuppoſe each of the Debts = 4 the Fund = 6. To extricate this, let us firſt adjuſt the real Ranking. By this Ranking the legal Hypotheck draws 2, not being concerned with the Ground of Challenge that the one conventional Hypotheck has againſt the other. All that the regiſtred Hypotheck can draw, ſuppoſing the unregiſtred out of the Field is barely 2. The other remaining 2 is left to the unregiſtred Hypotheck. This Scheme of Ranking falls in preciſely with the one above-mentioned: And ſo it ought, becauſe the regiſtring of *C*'s Hypotheck has the ſame Effect with his Inhibition againſt *A*, or *A*'s Conſent to his Preference.

Thus the Matter comes out, where the partial Grounds of Challenge operate a total Preference. The Caſes fall next to be conſidered where theſe partial Grounds operate only a *pari paſſu* Preference, or ſuch like, which is the Caſe of Adjudications within Year and Day. As for Example, we ſhall ſuppoſe *A* to be an Adjudger infeft, *B* an Annualrenter,

nualrenter, *C* a ſecond Adjudger *pari paſſu* with the firſt. In this Caſe, it is plain, all the ſecond Adjudger has to depend upon, is what remains of the Fund after ſatisfying the Annualrenter, and that Remainder too, he muſt lay his Account to ſhare with all prior Adjudgers, and poſterior within Year and Day. He can be in no better Situation than if *A* the firſt Adjudger were poſterior to the Annualrenter, or even were the laſt Adjudger, but within Year and Day. Whence it follows, That *C* the ſecond Adjudger in this Caſe can draw but half of the free Fund that remains unpre-occupied by *B* the Annualrenter. This Caſe is alſo reducible to the former, by taking it in this Light, *A* the firſt Adjudger is preferable to *B* the Annualrenter, and *B* the Annualrenter to *C* the ſecond Adjudger by Priority of Diligence, *C* the ſecond Adjudger is preferable to *A* the firſt Adjudger by the Act 1661, not totally indeed, but for the one Half. And accordingly he draws that Half as if *A* the firſt Ajudger were not in the Field. To illuſtrate this by an Example, let us, as formerly, ſuppoſe the Fund = 6, each of the Debts = 4; then *A* draws 4 in Competition with *B*. To *B* there remains 2, which he retains in all Events. To *C* again there remains but 2 unpro-occupied by *B*, which at the ſame Time he muſt communicate with *A*, upon Account of the *pari paſſu* Preference. So, upon the whole *A* draws 3, *B* 2, *C* 1.

In this View of the Matter it is taken for granted, That the Act of Parliament bringing in Ajudgers *pari paſſu* does not give the ſecond Adjudger all Advantages as if his Diligence were truly of the ſame Date with the firſt Adjudgers; ſuch Favour was ſurely not deſigned. All intended by the

Act

Act to cut off that Preference, which firſt Adjudgers naturally have by Priority of Diligence; ſo that it levels the firſt Adjudger's Preference in Competition with a ſecond, but gives no Privilege to a ſecond Adjudger in Competition with third Parties.

Having laid down the Rule and Method for determining the Preferences among compeating Creditors, it will be proper in the next Place to add ſome other Examples to theſe above ſet forth.

A an Annualrenter conſenting to *C*'s Preference.

B an Adjudger inhibiting before the Contraction of *C*'s Debt.

C an Adjudger *pari paſſu* ſubject to *B*'s Inhibition, and preferable to *A* by the Conſent.

Let us continue to ſuppoſe the Fund = 6, each of the Debts = 4.

In adjuſting the *real* Preferences, which fall firſt under Conſideration, *A* draws 4, and the two Adjudgers *pari paſſu* each of them draws 1. Next as to the *partial Grounds* of Preference, *B* the Adjudger Inhibiter cutting out *C* by Virtue of his Inhibition, muſt draw as he were not in the Field; and ſo takes 2, which is his ultimate Draught. *C* again muſt draw as *A* were not in the Field, which entitles him to no more but 2, being cut out of the other 4 by the inhibiting Adjudger. Theſe 2 *C* draws from *A*, and conſequently upon the ultimate Diviſion *A* draws 2, *B* 2, and *C* 2.

Let us again ſuppoſe each of the Debts = 5, the Fund continuing = 6. In this Caſe *A* will draw 4, *B* 1, and *C* 1.

Let now each of the Debts be = 6, the Fund continuing = 6. In this Caſe *A* will draw the whole.

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Another Example may be drawn from *l.* 16. *Qui potior. in Pign.* A Debitor hypothecates his Fund firſt to *A*, next to *B*, in the laſt Place to *C*. In a Competition betwixt *A* and *C*, *C* is unjuſtly preferred; but againſt this unjuſt Sentence there is no Appeal entred. *C* is alſo preferred to *B*; but upon an Appeal *B* obtains Redreſs. In this Caſe it is demanded, how the Preferences are to be adjuſted? *A* is preferable to *B*, and *B* to *C* by Priority of Time, *C* again to *A* by the Sentence not appealed againſt. This Caſe comes to be the ſame with that of three Annualrenters above-mentioned, whereof the laſt has an Inhibition againſt the firſt.

Another Example may be given, which deſerves well to be conſidered, 1*mo*, An Aſſignation intimate. 2*do*, An Arreſtment interveening betwixt the Aſſignation and Intimation. 3*tio*, An Adjudication whereof the Citation was prior to the Arreſtment, but poſterior to the Date of the Aſſignation. The Subject is the Rent of Lands, and the Parties all called together in a Multiple-poinding. Here the Arreſtment is preferable to the Aſſignation. *Stair, T. Aſſignation*, § 44. The Aſſignation is preferable to the Adjudication by Priority of Diligence. *Durie*, 2*d March* 1637, *Smith* contra *Hepburn*. And the Adjudication again to the Arreſtment upon the ſame Account. *Forbes*, 26. *June* 1705, *Steuart* contra *Steuart*. How is this Matter to be extricated? Here is a plain direct Circle of *abſolute real* Preferences, founded all upon the ſame Medium, which appears to be a plain direct Inconſiſtence: For it comes to the ſame as if *A* ſhould be made preferable to *B* upon any one Medium, and *B* again preferable to *A* upon the ſame Medium. In all the Circles that have hitherto caſt up, different *Media* of

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Preference are brought in to make the Circle. Thus it may readily be, that *A* is preferable to *B*, *B* to *C* upon one Medium, and *C* again to *A* upon another Medium; or more ſhortly, that *A* is preferable to *B* upon one Medium, and *B* to *A* upon another: As for Example, In two Inſeſtments of Annualrent, whereof the laſt has an Inhibition that ſtrikes againſt the firſt, *A* is preferable to *B* by Priority of Time, and *B* again to *A* by his Inhibition: But 'tis inconſiſtent that two Diligences can be mutually preferable upon the ſame Medium, which would infer this Abſurdity, That from the ſame Medium two oppoſite or inconſiſtent Concluſions might be drawn. In this Caſe the ſame Medium of Preference regulates the whole Competition, *ſciz.* the Priority of Attachment, or *Nexus realis* upon the Subject. Were this Medium carried ſteadily through, in comparing theſe Diligences with one another, it is impoſſible there could be any Difficulty. The Matter becomes inextricable by this alone, that in the Competition betwixt the Aſſigney and Arreſter, the Arreſtment is ſuppoſed to make a *Nexus realis* upon the Subject; whereas in Competition with the Adjudger, the Arreſtment is ſuppoſed only to be a *perſonal Prohibition* to the Debitor, and conſequently no *Nexus realis*. No Wonder then, that two inconſiſtent Suppoſitions in the ſame Competition ſhould bring on an inextricable Circle. To evade this, if it be alledged, That an Arreſtment is preferable interveening betwixt the Aſſignation and Intimation, upon a Preſumption of Colluſion betwixt the Debitor and Aſſigney, antedating the Aſſignation in Order to diſappoint the Arreſter. The Anſwer is ready, 1*mo*, There is no Ground in Law to infer ſuch a Colluſion with Reſpect to a formal Right, ſolemnly

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executed before Witneſſes, granted for an onerous Cauſe. 2*do.* Any ſuch Preſumption of Colluſion muſt neceſſarily operate in Favours of the Adjudger, as well as of the Arreſter, which yet was never pretended. The Matter therefore muſt neceſſarily come out in this Shape, either that Arreſtment makes a *nexus realis*, upon which Suppoſition, it muſt be preferable, in the preſent Caſe, both to Aſſigney and Adjudger; or, that it makes only a *perſonal Prohibition*, upon which Suppoſition, both Aſſigney and Adjudger muſt be preferable to it. That the laſt Suppoſition is the Truth of the Matter, will appear, 1*mo.* From the Nature and Stile of the Diligence. 2*do.* From this indiſputable Poſition, That Arreſtment ſtops not a poſterior Poinding. 3*tio.* From what is above laid down, that a poſterior Adjudication is preferable to an Arreſtment.

SECT. II.

Of the Competition among Diſponees, &c.

The Rules above laid down will apply equally to the Caſe of Diſponees, as to that of Creditors: There is no other Variety in the Caſes, but that of *limited* and *unlimited*. And even Creditors come frequently to have unlimited Claims; which happen ſo oft, as the Debt is equal to, or exceeds the Value of the Subject: In which Circumſtances they come to be preciſely upon the ſame Footing with Diſponees. In Competition among Diſponees, &c. real Preferences, and perſonal Grounds of Challenge caſt up the ſame Way, as among Creditors: And the Rule muſt equally obtain in both, that the perſonal Ground of Challenge is frequently cut

down, for Want of an Intereſt to plead it; ſo that *jus tertii* does equally regulate both Caſes.

To ſhew this Connection by an Example, let us ſuppoſe three Annualrenters, of which the laſt has an Inhibition againſt the firſt. Let the Fund be = 6, and each of Debts = 4. Upon this Suppoſition the Creditors will draw 2 a Piece. But again, let each of the Debts be = 6, and upon this Suppoſition, the firſt Annualrenter will draw the Whole, notwithſtanding that the laſt Annualrenter is preferable to him, by vertue of his Inhibition: Which in this Caſe, it is *jus tertii* for the laſt Annualrenter to inſiſt upon, the Fund as to him being intirely preocupied by the ſecond Annualrenter; ſo that, tho' the third Annualrenter ſhould prevail in his perſonal Challenge againſt the firſt, it would avail him nothing.

Inſtead of Annualrenters, let us now ſubſtitute Diſponees, and it is obvious, the Reſolution muſt be the ſame. The laſt Diſpoſition, tho' ſupported by an Inhibition, that ſtrikes againſt the firſt, cannot prevail. The *jus tertii* lies againſt him, in reſpect he can have no Benefit by the Challenge, the Fund being already preoccupied by the ſecond Diſpoſition.

It is then the *jus tertii* that equally regulates both Caſes; which allows the perſonal Challenge to go no further, than the Challenger can ſhew a Benefit thereby. It will readily occur, That among Diſponees, this Bar of *jus tertii* generally excludes the perſonal Challenge totally, the Fund being ſuppoſed already preoccupied by ſome third Right, againſt which the Challenge lies not: Among Creditors it is generally otherwiſe: For the third Right, againſt which the Challenge lies not, being limited,

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and for the moſt Part not abſorbing the whole Fund: this of conſequence allows the perſonal Challenge a *partial* Effect; as may be ſeen in all the Examples above given among Creditors; unleſs where the Debt of the interjected Creditor has been equal to the Value of the Fund. And this is the only Variety that does occur, in Application of the above Rules to the Caſe of compeating Diſponees.

Let us now proceed to give other Examples upon this Head.

EXAMPLE I.

Let us ſuppoſe, 1*mo.* A Death-bed Deed compleated, but reducible by the Heir. 2*do.* A ſecond Death-bed Deed, of the ſame Subject, conſented to by the Heir.

The firſt Deed cuts out the ſecond; the ſecond cuts out the Heir; and the Heir again cuts out the firſt.

To clear this Caſe, it muſt be premiſed, as a Thing taken for granted, that the Heir's Conſent here operates not a *Conveyance* of his Privilege, but barely a Renunciation thereof, with reſpect to the Right conſented to. If it did operate a Conveyance, there could be no Difficulty in the Queſtion, becauſe upon that Suppoſition, the Reduction would be competent to the ſecond Diſponee, as well as to the Heir himſelf. Taking the Conſent then as operating only a *Renunciation*, the Deciſion muſt come out in Favours of the firſt Diſponee. He ſtands firſt in the Order of Time; and as for the perſonal Challenge, competent to the Heir againſt him, the Challenge is barred by the *jus tertii*; the interveening Diſpoſition conſented to rendring it fruitleſs to

the Heir, to inſiſt upon his Privilege. And thus it happens, that a Conſent or other Deed, deſigned in Favours of one, may yet accrue ſolely to the Benefit of another.

EXAMPLE II.

1*mo.* A baſe Inſeſtment of Ward Lands. 2*do.* A publick Inſeſtment of the ſame, confirmed by the Superior, which excludes Recognition. 3*tio.* The Superior upon his Privilege of Recognition.

This Caſe is plainly of the ſame Nature with the former. It is *jus tertii* for the Superior to plead upon his Recognition, becauſe he can have no Benefit thereby; unleſs this Conſideration be brought in to difference the Caſes, drawn from the Nature of Holdings, *viz.* that a Superior has an Intereſt to chooſe his own Vaſſal; which may be alledged, as ſufficient to found him in his Challenge againſt the baſe Inſeſtment; altho' he have no further Inrereſt in the Queſtion, but that he be Vaſſal whom he has choſen, and whoſe Right he has conſented to. This Diſpute I ſhall leave *in medio*, as a little foreign to the Subject in Hand.

It muſt here be taken along, That Recognition is underſtood only as a perſonal Privilege competent to the Superior. Were it *in ipſo jure* Nullity, the Deciſion at any Rate would go otherwiſe: Upon that Suppoſition the ſecond Diſponee publickly inteſt, might found upon it *per* Poſ. VI. *jus tertii.*

EXAMPLE III.

1*mo.* A baſe Inſeſtment. 2*do.* A publick Inſeſtment. 3*tio.* The Superior in Right of Ward.

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In this Caſe, the publick Infeftment is good againſt the Ward, as holding of the Superior himſelf; and therefore it is plainly *jus tertii* for the Superior, to inſiſt againſt the baſe Infeftment, in ſo far as he is excluded from the Benefit of the Ward, by the publick Infeftment: And therefore the baſe Infeftment will come out preferable.

EXAMPLE IV.

1*mo.* A baſe Infeftment. 2*do.* Terce or Courteſy. 3*tio.* The Superior by Ward or Recognition.

In this Caſe alſo, it is plain, that in ſo far as the Superior is excluded, by the Terce or Courteſy, in ſo far will the baſe Infeftment have the Benefit thereof.

EXAMPLE V.

1*mo.* An Adjudication with a Charge againſt the Superior. 2*do.* Voluntary Diſpoſition with Infeftment reducible, as being granted *in curſu diligentiæ* of the firſt Adjudger. 3*tio.* Adjudger within Year and Day of the firſt.

In this Caſe, the Diſpoſition excludes the ſecond Adjudication, and is excluded by the firſt, in ſo far as the firſt would draw were the Diſpoſition not in the Field: And ſo it will come out, that the firſt Adjudger will have the Half of the Fund, providing his Debt amount ſo high, and the Diſponee will enjoy the Remainder.

EXAMPLE VI.

1*mo.* A Charge of Horning. 2*do.* An Aſſignation of a Bond to a Creditor, reducible by the Charger

ger, on the Act 1621. 3*tio.* Arreſtment thereafter laid on by a third Creditor, in Hands of the Debitor in the Bond.

Here the Aſſignation will ſtand good againſt Reduction; in reſpect that it is *jus tertii*, for the Charger to found upon it, being at any Rate excluded by the Arreſtment.

EXAMPLE VII.

1*mo.* An Adjudger with a Charge againſt the Superior. 2*do.* An Adjudger infeft without Year and Day. 3*tio.* An Infeftment upon a voluntary Diſpoſition, which Diſpoſition is of a Date prior to the Citation in the Adjudications.

In this Caſe, the Adjudger infeft is preferable.

EXAMPLE VIII.

1*mo.* A perſonal onerous Bond. 2*do.* An Infeftment upon a poſterior gratuitous Diſpoſition, granted in the Circumſtances of Bankruptcy. 3*tio.* An Infeftment upon an Adjudication for an onerous Debt, contracted after the gratuitous Diſpoſition; with which Adjudication the firſt onerous Creditor adjudging does not come in *pari paſſu*.

Here the gratuitous Diſpoſition comes out preferable.

We ſhall conclude with ſome Deciſions, that have paſt upon this Subject.

An Infeftment of Annualrent, being after the firſt Appriſing, and before the ſecond, all three were brought in *pari paſſu*, being within Year and Day, the Statute being new and dubious. *Stair 6. Februar*

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Langtoun's Affairs having gone into Diſorder, in the Beginning of the Year 1690; about the Time of his Retiring, he grants many heritable Bonds of Corroboration, whereupon Infeftments followed, before any Adjudications could be expede; and there were alſo many Inhibitions, ſome older, ſome later, before the granting of ſeveral of theſe Bonds of Corroboration; and the Creditors did all generally adjudge, within Year and Day. The Debts and Diligences did far exceed the Debitor's Eſtate: Whereupon a Competition of Creditors ariſing, ſeveral Queſtions did occur, which had never formerly been determined, eſpecially in the Ranking of ſimple, and inhibiting Adjudgers, and Annualrenters; which Queſtions were pled and determined, without Names of Parties, but upon the Nature of their ſeveral Rights and Diligences.

For the Annualrenters it was alledged, That their Infeftments of Annualrent, being prior to all the Adjudgers, they were preferable, and their Annualrents payable in the firſt Place, before an Adjudger could draw any Share of the Rents.

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And for the ſimple Adjudgers on Debts anterior to the Inhibitions, that the ſaid Inhibitions could not be any ways prejudicial to their Debts, but that

that they, as Co-adjudgers with the Inhibiters, ought to draw the ſame Share, as if no Inhibition had been uſed.

Theſe ſeveral Propoſitions were all ſeverally founded upon known Principles of Law, in caſe of Competition betwixt any two of the three contending Parties, but not reconcileable to one another in the Competition of ſimple and adjudging Inhibiters and Annualrenters, which was the Caſe that lay before the Lords to be decided.

The Lords after many Hearings *in preſentia*, and very mature Deliberation and Reaſoning amongſt themſelves, did, at laſt, come to eſtabliſh certain Rules for determining the preſent Queſtion, and the like that might occur in other Proceſſes of Ranking, which of late had fallen to be more frequent, and the Deciſions more accurate, in Regard of the late Acts of Parliament, anent the Sale of Bankrupts Eſtates.

The Rules eſtabliſhed by the Lords were theſe. *Firſt*, That an Inhibiter-adjudger did not ſimply reduce poſterior Annualrenters, but only in as far as theſe Annualrenters were prejudicial to the Inhibiter; And found, That Inhibiters would draw ſuch a Share of the Rents, or in caſe of Sale of the Property of the Eſtate, as would have belonged to them, if no poſterior voluntary Rights had been granted; And found, That anterior Creditors adjudging within Year and Day of the Inhibiter, could not be prejudged by the Inhibition, but that anterior Creditors adjudging would draw the ſame Share of the common Debitor's Eſtate, as if there had been no Inhibition uſed.

By this Deciſion the Inhibiter did not obtain full Payment of the Sums in the Inhibition before the

the Annualrenter could draw any Share, nor did the Annualrenter loſe all, but a Part only; nor was the Annualrenter allowed to recur upon Adjudgers for anterior Debts for making up that Share, which the Inhibiter reduced and cut off. As for Example, ſuppoſe the Caſe, That the Subject affected is worth 12000 Merks, and that there are three Adjudgers *pari paſſu* for 5000 Merks each, and one Annualrenter effeiring to 6000 Merks, and that one of the Adjudgers is alſo an Inhibiter before contracting the Annualrenter's Debt; the Diviſion falls thus. The three Adjudgers for equal Sums, do firſt divide the 12000 Merks in equal Parts, whereof each draws 4000 Merks, and thereby loſe each 1000 Merks; the Annualrenter being a common Burden on the Subject affected, and preferable to all the Adjudications, claims 2000 Merks from each of the three Adjudgers, as a Stock effeiring to his Annualrent; but the inhibiting Adjudger ſtrikes off his Claim, by virtue of his Diligence of Inhibition; but the poſterior Adjudgers having no Defence, the Annualrenter draws 2000 Merks from each of them, whereby the inhibiting Adjudger gets his full third Share with the Co-adjudgers, but loſes 1000 Merks of his whole Sum, and the Annualrenter loſes 2000 Merks, and gets 4000 Merks, and the Co-adjudgers get each 2000 Merks of the remaining 4000 Merks.

According to this Rule, the Lords did uniformly determine in all ſubſequent Rankings and Sales for ſeveral Years; And the Rules are found practicable in all the Variety of Caſes that did occur in the ſeveral Proceſſes of Sale, which have been very frequent ſince that Time. But thereafter in the Caſe of *Garridden*, there happened a ſpecial Circumſtance,

which had not been pled when the Rule was eſtabliſhed, and ſome Alteration had alſo happened on the Bench ſince that Deciſion; whereupon the whole Foundation of that Rule and Deciſion was called in Queſtion, and often debated *in preſentia*, and ſeveral Bills; And after a Review and full Conſideration of the Caſe, the Lords did proceed upon the ſame Foundation, and ſtrengthned the former Rule.

Carridden's Caſe occurred in the Competition of the Creditors of *Cockburnspath*, a Part of *Nicolſon*'s Eſtate; and he being an Inhibiter, and alſo an Adjudger within Year and Day, the Lords found his Adjudication null; But he inſiſted as Inhibiter for reducing the Right of ſeveral Debts after his Inhibition, whereon Adjudication had been led within Year and Day of other Adjudgers on Debts anterior, alledging, That he could not be wholly excluded, while theſe Adjudgers on poſterior Debts were admitted to a Share of the Price; for he could ſtill adjudge, whereby his Adjudication would be drawn back to his Inhibition, and always be preferable to ſuch Adjudgers, whoſe Debts were poſterior to his Diligence.

To which it was anſwered, That his Adjudication could afford him no Share, becauſe ſetting aſide all the poſterior Creditors, the Diligences on anterior Debts were far beyond the Value of the Subject of the Competition; And ſeeing his Inhibition could not prejudge theſe anterior Debts nor Diligences, it afforded no Prejudice to him that poſterior Creditors by their Diligence came in *pari paſſu*, to get a Share with anterior Creditors; becauſe, tho' theſe poſterior Debts had never been contracted, *Carridden* was utterly excluded, and his Inhibition

bition was only a prohibitory Diligence; whereupon he could not reduce poſterior Debts ſimply, but in ſo far as they were prejudicial to his Debt; and his After-adjudication could not ſtate him in the Caſe of theſe poſterior Annualrenters, ſo as to make the Benefit of their Annualrents accreſce to him.

Upon the ſeveral Debates in that Caſe, the Lords at laſt, by their Interlocutor 15th *February* 1698, found, That an Inhibiter cannot be prejudged by poſterior Debts, nor anterior Creditors prejudged by an Inhibiter; And found, That the contracting of Debts after an Inhibition could not be profitable to an Inhibiter, nor does their Diligence accreſce to him, and that therefore *Carriden* could draw no Share of the Price of *Cockburnspath.*

According to theſe Rules, all the Rankings have ever proceeded uniformly without any Contradiction. But of late in the Competition of the Creditors of *Langtoun*, that Rule was again called in Queſtion; And upon a Petition, ſeveral Times moved by the Inhibiters, a Hearing allowed *in preſentia*, in which it was alledged, That the Rule above ſet down could not conſiſt with the true Effect of an Inhibition, which was not only a prohibitory, but a preparatory Diligence, and that an Adjudication coming after, whether within Year and Day of other Adjudgers or not, was always to be drawn back to the Date of the Inhibition, ſo as to remove all poſterior Annualrents or other Diligences on poſterior Debts, and theſe being removed, the Inhibiter fell to come in to get the full Payment of the Debts in his Inhibition, at leaſt to the Extent of the voluntary Rights; and then the Annualrenter, being preferable by the Nature of his Right and Security,

came in the next Place to get the full Payment preferable to posterior Co-adjudgers. As for Example, In the Case formerly stated of a Subject to the Value of 12000 Merks, and three Adjudgers for 5000 Merks each, and an Annualrenter effeiring to 6000 Merks; the Annualrenter, as preferable, draws first his Share, *sciz.* 6000 Merks, which is set aside; so the remaining 6000 Merks being divided in three, each Adjudger gets 2000 Merks; But the inhibiting Adjudger recurs upon the Annualrenter by virtue of his Diligence, from whom he draws 3000 Merks more to make up his 5000 Merks; then the Annualrenter, by the Nature of his Right being preferable to the Co-adjudgers, recurs on them, from whom he draws the said 3000 Merks; so remains only to the Co-adjudgers 1000 Merks.

For inforcing this, the Inhibiter insisted upon the Nature of the Diligence, alledging, That the Adjudger's Diligence reach'd nothing but the Reversion over and above the Annualrent, which was preferable upon every Part of the Subject adjudged; and therefore the Inhibiter getting his full Share by virtue of his Adjudication and Inhibition, the Annualrent lay upon the Shares of the Co-adjudgers; and it often happens, that an Inhibiter gets a better Share, by Reason of posterior voluntary Rights, than he would have had without them. As for Example, Suppose that in place of a Right of Annualrent, a posterior Creditor had obtained either a proper Wadset, or a redeemable Right of a Part of the Debitor's Estate, and being thereupon infeft was preferable to the posterior Adjudgers, in that Case the Inhibiter would have an equal Share with the Co-adjudgers, if within Year and Day; and

and what were wanting would be made up to him by affecting the Wadſet or Right of Property made after his Inhibition, wherein the Co-adjudgers would have no Share nor Intereſt, and by that Means the full Sum in the Inhibition would be made up, and he in a much better Condition than he would have been, if no poſterior Right had been granted. And ſuppoſe again, That this Inhibiter had not adjudged within Year and Day, he would indeed have had no Share in the Reverſion or Superplus with prior Adjudgers, but his Diligence would have been drawn back to procure to him full Payment of the Sums in his Inhibition, at leaſt ſo far as the Value of the poſterior voluntary Right did extend to; And there is no Reaſon that the Caſe of an Inhibiter ſhould be worſe where there is a poſterior Annualrent, than it would be if no proper Wadſet or partial Right had been granted.

To all which it was anſwered, That the Rules above laid down are moſt juſt and equitable, and nothing material objected.

The fundamental Rules are, *1mo*, That an Inhibiter cannot be prejudged by poſterior Debts. *2do*, That an anterior Creditor can no ways be prejudged by an Inhibition; whereas by what's now pled, an Inhibition would ſtrike more effectually againſt the prior Creditor than the poſterior Annualrenter; For tho' the Inhibiter recurs upon the Annualenter as poſterior, the Annualrenter recurrs again upon the Adjudgers whoſe Debts were contracted prior to the Inhibition, by which Means the Annualrenter loſes nothing, tho' the Inhibition ought only to ſtrike againſt poſterior voluntary Deeds, and the Adjudger on prior Debts is at the whole Loſs, albeit it be a moſt certain Principle,

that

that an Inhibition has no imaginable Effect againſt anterior Debts, and Diligences following thereupon: So that there muſt certainly be a Fallacy in that Reaſoning, and there is no Manner of Myſtery, or the leaſt Difficulty in finding where the Fallacy lies, *viz.* an Inhibition is no Ground Reduction of poſterior Debts ſimply to anull them, but only in ſo far as they are prejudicial to the Debt in the Inhibition, that is to ſay, in ſo far as the Inhibiter falls to draw a leſs Share of the Eſtate or Rents thereof, than he would have obtained if no poſterior voluntary Deed had been done: And an Inhibition is merely a prohibitory Diligence for removing the Prejudice of poſterior Deeds, but does not give any poſitive Right, nor ſtate the Inhibiter Adjudger in Place of the Annualrenter, ſo as to draw a Share by Virtue of the Right of Annualrent as the Inhibiter muſt acknowledge by his own Argument; for if the Inhibiter came in Place of the Annualrenter, that is to ſay, if the Right of Annualrent did accreſce to the Inhibiter, then the Inhibiter getting Payment in the Right of the Annualrent would extinguiſh the Annualrent, and conſequently the Annualrenter could never recur upon the Coadjudgers. So that the Scheme offered by the Inhibiters is inconſiſtent with Law and Reaſon in every Circumſtance; For the Inhibiter can never have what was competent to the Annualrenter, but by coming in his Place, and cauſing the Annualrent to accreſce, which were a Notion abſurd and inconſiſtent. And what's urged, that an Inhibition is not only a prohibitory but a preparatory Diligence, is a new invented Notion never heard of in any former Caſe, and without any Foundation in Law.

And

And, whereas it is alledged, That in the Caſe of a proper Wadſet, or a partial Right of Property after Inhibition and before the Adjudications, the Inhibiter ſtrikes out the poſterior Wadſetter or Purchaſer, and comes in his Place; from which 'tis inferred, 1*mo*, That an Inhibiter may have Advantage by poſterior voluntary Deeds. 2*do*, What muſt be acknowledged to be in the Caſe of a proper Wadſet or an irredeemable Right of Property, ought alſo to hold in the Caſe betwixt the competing Annualrenter and Inhibiter,

It is anſwered, That in the Caſe propoſed, an Inhibiter may have an accidental Advantage in the Competition with other Creditors by poſterior voluntary Deeds; For the Inhibiter would not only have a Share with the Co-adjudgers in the Reverſion of the Debitor's other Eſtate, but further would affect the Lands irredeemably diſponed or wadſet after his Inhibition, but cannot have the like Benefit in the Caſe of an Annualrenter, and it often happens, that by a Competition a greater Benefit ariſes to ſome Creditors than would do, if ſome of the Parties competing were out of the Field; becauſe in a Competition of many Creditors, there muſt be general Rules and Foundations in Law with Regard to the Rights and Intereſts of the ſeveral Creditors competing, which alter, if the Rights of ſome of theſe Creditors be drawn out of the Field. As for Example, In the Competition betwixt an Inhibition and a poſterior voluntary Right without the Concourſe of other Creditors, the Inhibition is alalways preferable; but in the Competition of many other Creditors, the Inhibition may happen to be totally excluded, and poſterior Rights get a Share.

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To apply this to the Caſe propoſed, a proper Wadſetter, or a Right of Property of a Part of the Debitor's Eſtate, does wholly ſeparate and ſet apart the Wadſet Right or the Property from the Debitor's Eſtate in Competition with poſterior Adjudgers, whereby they are intirely excluded from that Wadſet or Right of Property; but *quoad* the Inhibiter, the Wadſet or Right of Property is null, and therefore the inhibiting Adjudger removing the voluntary Right by his Inhibition comes to receive the Benefit of the voluntary Right ſo far as is wanting to him by his Diligence in Competition with Co-adjudgers or other Creditors: Whereof the Reaſon is plain, becauſe ſuch voluntary Rights do in the firſt Place wholly exclude Adjudgers not Inhibiters, and then the Competition falls ſingly betwixt Inhibiters and poſterior Purchaſers; and in the Competition of theſe two, the Inhibiter is ever preferred; but that makes nothing to the Advantage of what is now urged to be a Rule in the Competition of ſimple and inhibiting Adjudgers and Annualrenters. For,

1*mo*, The poſterior Wadſetter or Purchaſer ſo excluded does not recur upon the poſterior Adjudgers, but only ſuffers the Loſs as having reſted upon voluntary Rights without Diligence; and ſo the Rule above ſet down, That prior Creditors are not prejudged by the Inhibition, ſtands ſtill good, whereas in the preſent Debate it is alledged, That as the Inhibiter recurrs upon the Annualrenter; ſo the Annualrenter alſo recurrs upon Adjudgers and anterior Debts.

2*do*, There is a manifeſt Diſparity betwixt the Caſe of an Annualrenter and a proper Wadſetter or Purchaſer of a Part of the Debitor's Eſtate by an irre-

irredeemable Right; for the laſt two do intirely divide and ſeparate the Wadſet or irredeemable Right from the Remainder of the Debitor's Eſtate, and thereby does wholly withdraw his Purchaſe from the poſterior Adjudgers; whereas an Annualrent Right reſembles a Servitude, and is a Burden conſiſting with the Property, and affecting every Part thereof; and therefore the poſterior Adjudgers carry the Property ſo affected: And when theſe Adjudgers divide the Property or the Rents, the Annualrent which lies as a Burden is equally proportioned amongſt the Adjudgers according to their Dividend; But that Proportion of the Annualrent which falls upon the Share of the inhibiting Adjudger is ſtruck off, whereby he gets the ſame Share that would have fallen to him if there had been no Annualrent, and becauſe the ſaid Share of the Annualrent is cut off by the Diligence of an Inhibition, the Annualrenter is at a Loſs, and cannot recur upon the Adjudgers who did not inhibit, becauſe the Inhibition can no more prejudge anterior Creditors than poſterior Deeds can prejudge the Inhibiter. As for Example, In the Caſe above ſtated of a Competition for a Stock of 12000 Merks, the three Adjudgers *pari paſſu* for 5000 Merks each get only 4000 Merks, and the Annualrenter effeiring to 6000 Merks, gets 2000 Merks from each of the two Adjudgers who did not inhibit, but draws nothing from the Inhibiter, as being after his Diligence. And ſuppoſe again, That the Inhibiter were not *pari paſſu* with the other two Adjudgers, but Year and Day after them, theſe two Adjudgers would firſt draw their full 10000 Merks out of the common Stock, whereby there would remain 2000 Merks to the Annualrenter, and then the Annualrenter would

draw his other 4000 Merks from the two first Adjudgers which would make up his whole Annualrent, but the Inhibiter who was not within Year and Day would reduce the Annualrent in so far as extended to the 2000 Merks more than fell to the first two Adjudgers, because tho' the first two Adjudgers were preferable as to their 10000 Merks, and in so far as the Annualrenter draw from them, the Inhibiter was not prejudged, yet as to the Superplus of 2000 Merks, the Competition falling betwixt the Inhibiter and a posterior Annualrenter, the Inhibiter is intirely preferred. But suppose again, That there were three Adjudgers *pari passu* still for 5000 Merks, and an Inhibiter Adjudger, Year and Day after, for the like Sum, and an Annualrenter as formerly; in that Case, the three Adjudgers on anterior Debts would each draw 4000 Merks, and the Annualrenter would draw 2000 Merks from each of them, and so obtain full Payment, and the Inhibiter Adjudger not within Year and Day would get nothing, albeit the posterior Annualrenter gets all, as was found in the forecited Case of *Carridden*, because the Inhibiter is not prejudged by the Annualrenter who can never compete if the Question were betwixt them two; but the whole Stock being affected and exhausted by preferable Adjudications for anterior Debts, the Inhibiter is thereby effectually excluded by his own Negligence and the Diligence of the other Creditors, and is noways prejudged by the Annualrenter who by his Preference to the Co-adjudgers gets his full Annualrent, which the Inhibiter ought not to envy, and can not quarrel the Annualrenter's Advantage, not being in Defraud and Prejudice of him. And thus it happens, that in the Competition of many

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Creditors, the Diviſion being made according to Foundations and Principles of Law, a voluntary Right obtains Preference and Payment, when an anterior Inhibiter is wholly excluded, not by the Annualenter, but by other competing Creditors; and it is a miſtaken Notion of the Import of an Inhibition, to imagine, that an Inhibition gives any poſitive Right, or that the Inhibiter is prejudged as long as he gets not his full Payment preferrable to poſterior Annualrents; for the Effect of his Diligence is only that he do not get leſs than if theſe Annualrents had not been granted, or that in Competition with voluntary Rights alone, and without the Intervention of other competing Creditors, the Inhibiter is always preferred to the voluntary Right; But where other Creditors come in *pari paſſu*, or are preferable to the Inhibiter, and poſtponed to the Annualrenter, every Creditor draws his Share according to the Nature of his Right and Diligence.

The Lords found, That in the Competition of ſimple and inhibiting Adjudgers and Annualrenters, the inhibiting Adjudger could only reduce the poſterior Annualrent, in ſo far as he was thereby prejudged; and that he could not claim full Payment of the Sums in his Inhibition, before the Annualrenter could draw any Share in the ſaid Competition, but could only draw ſuch a Share of the Annualrents or Price as he would have drawn, if there had been no poſterior Annualrent or voluntary Right.

The Eſtate of *Tofts* being ſold at a publick Roup, and the Decreet of Ranking remitted to an Accomptant, to draw out a Scheme of the Diviſion of the Price amongſt the Creditors, an Objection was

ſtarted againſt the Scheme, to underſtand which, the following Fact is neceſſary to be known. 1*mo*, *Suſanna Belſhes* had an Inhibition in the 1672, and Adjudication upon the ſame Ground of Debt in 1685. 2*do*, *Kippenroſs* had an Inhibition in the 1673, with an heritable Bond of Corroboration and Infeftment in the 1679, which Infeftment was ſtruck at by *Suſanna Belſhes* her Inhibition. 3*tio*, A Set of Annualrenters, ſome prior, ſome poſterior to *Kippenroſs*, but all of them ſtruck at by his Inhibition. 4*to*, A Sett of Adjudgers in the 1685, coming in *pari paſſu* with *Suſanna Belſhes* her Adjudication, ſtruck at by neither of the Inhibitions To reduce this Caſe to its ſimpleſt Terms, and to throw off extraneous Circumſtances, *Kippenroſs*'s Inhibition, and the Effect thereof was firſt conſidered; which ſtriking only againſt the poſterior Annualrenters, the Caſe was taken up, as if theſe Annualrenters were not in the Field: And at the ſame Time, the Inhibition itſelf was laid aſide, it having thus got its full Effect, by throwing out of the Field every Right it ſtruck againſt. This being premiſ'd, the Caſe reduc'd to its ſimpleſt Terms came out thus. 1*mo*, An Infeftment of Annualrent, *ſciz.* *Kippenroſs*'s. 2*do*, Poſterior Adjudgers coming in *pari paſſu*; of which Adjudgers, one, *ſciz.* *Suſanna Belſhes*, has an Inhibition that ſtrikes againſt the Infeftment of Annualrent.

The Queſtion is, How are theſe Creditors to draw their Proportions? The Annualrenter is ranked *primo loco*; and the Inhibiter, without doubt, draws from him whatever ſhe could draw, were he not in the Field. So far the Matter is clear. But now the Diſpute comes, Can the Annualrenter recur againſt the other Adjudgers againſt whom the

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Inhibition ſtrikes not for any Share of what was drawn from him by the Inhibition? The Scheme ſays No; the Objector ſays Yes.

To go to the Foundation of this Matter, it muſt be carefully attended to, that an Inhibition is in itſelf no *real* Right, gives no Preference in the Subject, not being directed againſt the Land but againſt the competing Creditors, ſuch of them as it ſtrikes againſt. In a Word, being but a *perſonal* Prohibition directed againſt Creditors, it affords only a *perſonal* Challenge, which does not alter or diſturb the *real* Preferences.

For Example, If there be three Annualrenters, *A*, *B*, *C*, following one another in the Order of Time, and ranked accordingly: Let us ſuppoſe that *C*, the laſt Annualrenter, has an Inhibition ſtriking againſt *A*, the firſt Annualrenter. Let the Eſtate be 800, and the Value of each of the Annualrent Rights 400: In this Caſe the Method of drawing can be no other but this. *A*, the firſt Annualrenter, is preferred *primo loco*, and draws his whole Sum, *viz.* 400. By which his Annualrent-Right falls to be extinguiſhed by Payment. *B*, the ſecond Annualrenter, draws all that remains, being other 400. And thus ſo far as concerns the *real* and *direct* Preferences, *C*, the laſt Annalrenter, is cut off, and draws nothing. But then when we go to conſider the Pretences, that one Right or Diligence may have againſt another, which my Lord *Stair* terms, *Page* 649, *The partial Reaſons of Reduction*; we find that *C* has an Inhibition againſt *A*, and therefore muſt draw from him whatever he would have drawn by Vertue of his Annualrent-Right, had *A* never exiſted, which is no leſs than his 400. And thus the ultimate Diviſion comes out. *B* gets 400,

C gets

C gets 400, and *A* gets nothing. Now in this Caſe the Objector muſt ſay, that *A* recurs againſt *B* for what was drawn from him by the Inhibiter, which lands in giving *C* 400, *A* 400, and *B* nothing. And he comes at this Concluſion by conceiving *C*, by Virtue of his Inhibition, preferable in the firſt Place, *A* in the ſecond Place, and *B* in the laſt Place, which is plainly fallacious. 1*mo*, Becauſe an Inhibition, as ſaid is, gives no *real* Preference. 2*do*, Becauſe it is evident, let *A* and *C* adjuſt their Preferences, as they beſt can, that *B*, the ſecond Annualrenter, againſt whom the Inhibition ſtrikes not, muſt poſſeſs the ſecond Place. So that if we ſhall allow *C*, by Vertue of his Inhibition to take up the firſt Place naturally due to *A*, that cannot harm *B*. *A* being thus beat out of his Place, cannot diſpoſſeſs *B*, but muſt upon that Suppoſition fall back to the laſt Place. And were this otherwiſe, great Abſurdities would follow. According to the Objector's Scheme, as was juſt now demonſtrated, the Eſtate being 800, and each of the Annualrents 400, *C*, the Inhibiter, draws his whole Claim, *A* his whole Claim, and *B* gets nothing at all. What is this but to ſay, that the Inhibition excludes *B*, tho' it has no Cauſe of Reduction againſt it, and preſerves *A*, tho' it is againſt *A* only that it ſtrikes.

There is another Caſe which tends much to illuſtrate this Doctrine. Let us ſuppoſe a Liferentrix who, having the preferable Right upon the Eſtate, conſents to the Preference of another Creditor, which Wives are frequently led to do. Let us ſuppoſe, at the ſame Time, a third Creditor who has an Infeftment of Annualrent interjected betwixt the Liferent-Right and the Right conſented to. 'Tis plain that the

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Conſent here alters nothing of the *real* Preferences. The Liferentrix falls to be ranked *primo loco*, the other Creditor *ſecundo loco*, and the Right conſented to *ultimo loco*. And in that Order they muſt draw their reſpective Proportions, and the Eſtate of Conſequence be disburdened. The Right indeed ranked in the laſt Place, by Vertue of the Conſent, muſt draw from the Liferentrix whatever it would have drawn, had the Liferentrix not been in the Field. But ſure this could never intitle the Liferentrix to recur againſt the Annualrent ranked in the ſecond Place, whoſe Right the Conſent harms not. As to him, the *Conſent* is *res inter alios*, which can neither hurt him or do him Service. The Foundation of Law is precilely the ſame in the Caſe of Inhibition. The Effect of which is reſtricted againſt the Creditors which it ſtrikes at; and in no Caſe can either harm or benefit others.

All this is to clear the Method of making out Schemes in Rankings, which has been continually practiſed and followed ever ſince the Viſcount of *Stair*'s Time, who was the firſt that fixed this Rule, *viz.* That the *real* Rights muſt firſt be ranked according to their Preference; and having drawn their Sums accordingly, the Eſtate falls to be diſburdened of them, and they extinguiſhed by Payment. In the next Place muſt be conſidered the partial *Pretenſions* or Reaſons of Reduction that any of the Creditors may have againſt others. As to ſuch the Rule is,----" That whatever is drawn " from a preferable Creditor upon any perſonal " Conſideration, intitles him not to recur againſt " any other preferable Creditor poſterior to him, a- " gainſt whom the perſonal Conſideration militates " not." See, *Stair Page* 649 at the Foot.

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To apply all to the Caſe in diſpute, which is that of an Annualrenter, and two poſterior Adjudgers, one of which has an Inhibition ſtriking againſt the Annualrenter; my Lord *Stair* in the above cited Place, has well fixed that the Annualrent-Right muſt be ranked firſt, and the Adjudications in the ſecond Place *pari paſſu*. Then he conſiders the Effect of the Inhibiter's *perſonal* Claim againſt the Annualrenter, but allows not the Annualrenter at all to recur againſt the other Adjudger for what was drawn from him by the Inhibition, which were landing in the above Abſurdity, no leſs than allowing the Annualrenter, when he is beat out of his own Place, to take up the ſecond Place, and diſpoſſeſs thereby the Adjudger, whoſe Place by Right it is, whereby the Inhibition would come to ſtrike againſt the Adjudger, and not againſt the Annualrenter, in expreſs Contradiction to the Intendment of the Diligence, which the Law ſays, in this Caſe, ſtrikes only againſt the Annualrenter and not againſt the Adjudger. Now here the Objector would have the inhibiting Adjudger to be ranked in the firſt Place, and thereby to take up the Place of the Annualrenter, becauſe the Inhibition ſtrikes againſt him. He would have the Annualrenter ſtruck out of his own Place, to take up the ſecond Place poſſeſſed by the Adjudger, and he would ſend the ſecond Adjudger thus unjuſtly diſpoſſeſt, to ſeek his Redreſs off the firſt Adjudger, in the beſt Manner he can, which is evidently contrary to the Nature of the Thing, and the Conception of theſe Diligences.

To ſum up all, when *Kippenroſs* pleads upon his Inhibition, no doubt it muſt have its Effect, and thereby muſt be ſtruck out all the poſterior Inſeſtments

ments of Annualrent. In the next Place, when he pleads upon his Infeftment, he has a Title to be ranked for his whole Sum, he is accordingly ranked and draws his whole Sum; and thus his Infeftment has alſo its full Effect. There is indeed a *perſonal* Claim upon him by Vertue of an Inhibition, which takes from him ſome Share of his Draught: But this *perſonal* Claim, the other *real* Creditors have no Concern with; as to them 'tis plainly *res inter alios* they cannot be leſed thereby. The Inhibition militates againſt *Kippenroſs*'s Annualrent, not againſt the poſterior Adjudgers: They cannot be in a better or worſe Situation, than if that Inhibition were not in the Field; and therefore whatever *Suſanna Belſhes* her Inhibition draws from *Kippenroſs*, this cannot burden the Adjudgers, or put them in any Situation by which they ſhall draw one Farthing leſs than if the Inhibition never had exiſted.

The Lords found, That *Kippenroſs*'s Infeftment being once ranked, ſo as to draw his Share in Competition with the other *real* Creditors; that he could not recur againſt the poſterior *real* Creditors for any Part of what was drawn from him by *Suſanna Belſhes* her Inhibition,------*Feb.* 1730. *Campbell* contra *Drummond*.

In a reclaiming Petition, the Objector againſt the Scheme endeavoured to turn his Argument into another Shape, he pled according to the Rule laid down by Lord *Stair*, *Page* 649, § 28. "That "the Adjudgers are to be accounted as joint Pro- "prietars, and the Infeftments of Annualrenters as "Servitudes on the Property." Whence he drew this Conſequence, That as it is the Property of an Annualrent-right to affect every Part of the Ground

in ſolidum, in which *unaquæqua gleba ſervit*, therefore it was in *Kippenroſs*'s Power to draw his whole Sum out of the ſimple Adjudger's Part; and he behoved ſo to do, becauſe he was barred by the Inhibition from any Demand upon the inhibiting Adjudger. But the Anſwer was obvious to the Lords. 1*mo*, That this Argument went upon a Fallacy; ſuppoſing each Adjudger to be poſſeſſed of a different Tenement, without any Connexion or Relation to one another, and the Annualrent a Burden upon both: Whereas the Subject was but one, and the Adjudgers had each of them a Right over the whole *pro indiviſo*. Attending to this, the Objectors Argument falls to the Ground, becauſe, before there could be any Acceſs to make a Partition of the Land itſelf, or the Price coming in its Place, betwixt the two Adjudgers; all the Burdens upon the joint Property muſt have been conſidered and paid off, ſo as to leave the Remainder clear to be divided equally betwixt the Adjudgers. 2*do*, *Eſto* the Scheme ſhould be framed in this Way which the Objectors ſeems to point at, *ſciz.* firſt to divide the common Subject betwixt the two Adjudgers, joint Proprietars: To be ſure the next Thing to be done was to divide the common Burdens alſo; by which Means, no more but the one Half of the Annualrent would fall to be a Burden upon the ſimple Adjudger. 'Tis true, this could not limit the Annualrenter's Right who might notwithſtanding draw his whole Sum from the ſimple Adjudger. But then the ſimple Adjudger, who had not only paid his own Share of the Annualrent-right, but alſo that Share which by the Diviſion was laid upon his Co-adjudger, would without Controverſy be intitled to *Recourſe* againſt the Co-adjudger, as having

having paid a Debt which he, the Co-adjudger, was ultimately liable in. And this brings it back preciſely where it was before, by the other Method of Calculation. And indeed it would be abſurd, that two Schemes both right, occaſioned only by taking up the Matter in different Lights, ſhould terminate in different Concluſions. Upon which Conſiderations the Lords refuſed the Bill without Anſwers.

Obſervations upon Preſcription.

AS Man is not formed complete in himſelf, but an indigent Being, ſtanding in Need of daily Supplies from without; The Deity has beſtowed the Earth upon Man, and Men upon one another. Towards this End he has wiſely implanted in our Natures the remarkable Affections to PROPERTY and SOCIETY. In this equally provident as in his other Diſpenſations to Mankind, not only to furniſh us ſufficient *Means*, but, which is admirable, to compel us in the moſt agreeable Manner to make Choice of, and embrace theſe *Means*. Poſſibly at firſt, when the World was thinly peopled, and great Plenty of common Neceſſaries of Life, the Affection for *Property* was ſmall, and the natural Notions of *Appropriation* little cultivated. But as Mankind grew numerous, and the Neceſſaries of Life not ſo eaſily come at, Labour and Induſtry became of Value, and PROPERTY to be conſidered: For without Property, Labour and Induſtry was in vain. The Foundation of Property *a poſteriori* is apparent; that it is alſo founded *a priori* in the Nature of Man,

Man, and conſequently in the original Laws, is alſo certain. Evident from this, that Nature, which makes nothing in vain, has provided every Perſon with an AFFECTION to Property, wherein is founded that Connection betwixt Men and Things, which we call commonly by the Name of *PROPERTY*, and whereby Nature prompts a Man to be differently *affected* to one Thing from another; and which Affection leads us to beſtow Care in preſerving, Labour and Induſtry in improving what we thus conſider as our own; and frequently enhances the Value of it in our Imagination above Reality, and above the Value we attribute to any other Thing that does not ſtand with us in that Relation. This AFFECTION is as much founded in Nature as that we bear to our Children, or any Affection whatever. And the Deſign is admirable: For 'tis this Affection that is the *primum mobile* of all that Induſtry and Diligence Men beſtow upon their Affairs. Providence foreſaw Appropriation neceſſary, and it fitted us with *Affections* and *Faculties* leading to that End. And thus PROPERTY is founded *a priori* in the Nature of Man, or, which is the ſame, in the abſtract Laws of Nature: The abſtract Laws, relating to whatever Species of Beings, being nothing elſe but the Regulations their Natures and Conſtitution prompt and direct them to govern themſelves by.

PROPERTY being thus founded in the Law of Nature, there are MEANS of acquiring and loſing it, founded alſo in the ſame Law. OCCUPATION is the primary MEAN of acquiring Property, and DERELICTION of loſing it. When we relinquiſh our Property by any expreſs poſitive Act of the Will, no Body queſtions the Effect.

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But it has not been ſo clearly underſtood, that the ſame Effect may be wrought negatively by *Neglect*, *Deſertion* or *Diſuſe*. Moſt Writers agree that Preſcription is a Creature only of poſitive Statute, not at all founded in the Law of Nature; thus *Grotius*, *Jur. Bell. L.* 2. *C.* 4. thus *Puffendorf*, *L.* 4. *C.* 12. But let us examine humane Nature: Let us ſee what it ſays as to this Diſpute; for to it muſt ly the ultimate Appeal. Let us ſuppoſe, that by ſome Accident one loſes a Jewel, he's concerned, and contrives all Means for Recovery. The Affection of Property exerts itſelf; and during that Time the Thing is as much his as ever. His Attempts prove unſucceſsful, Hope loſes Ground, he deſpairs. By Degrees his Loſs wears out of his Mind. His Affection cools, and at laſt evaniſhes. He loſes intirely the Conſciouſneſs of Property. Thus the Matter lies over for many Years. My Poſition is, That the Connection betwixt the Man and his Jewel is by thoſe Means as throughly diſſolved, as if he had derelinquiſhed it by the moſt poſitive Act, or as if it had never been his. The Affection and Conſciouſneſs ceaſes, upon which his Property is founded, and Property ceaſes of Conſquence. 'Tis upon this Foundation that Things loſt by Shipwreck, after ſuch long Time as the Proprietor has given over all Hope of Recovery, go to the firſt Finder, *L.* 58. *Ad. R. D.* 'Tis upon the ſame, that a Hunter, ſo ſoon as he gives over Hope of his Quarry, loſes that Title of Prevention which he had by the Purſuit; after which the Law gives Acceſs to the next Finder. If this hold with Reſpect to the Perſon himſelf who once had the Affection of Property, much more with Reſpect to his Heirs, who never were in Poſſeſſion, and poſſibly

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in Time may have intirely loſt the Knowledge of their Predeceſſors Right. Thus then Dereliction may be diſtinguiſhed into two Kinds, poſitive, or active, and negative, or paſſive. The poſitive Act is properly ABDICATION; and hereafter, when we intend to expreſs the negative, we ſhall indifferently uſe the Terms of DERELICTION or DESERTION.

Let us now put the Caſe, that the Jewel is found by a Perſon, who, after uſing all the proper Means of diſcovering an Owner, takes it up upon the Footing of Dereliction. To make the Caſe ſtronger, inſtead of a Jewel, let us ſuppoſe a Piece of Ground, or ſomething elſe, that the Finder may poſſibly imagine never had been appropriated. He continues to poſſeſs as Proprietor. He lays out Money, builds a Houſe, and makes great Embelliſhments. The Eſtate deſcends from Father to Son. The natural Affection increaſes by Time to this paternal Inheritance, which has been now in the ſame Family, if you will, for ſeveral Centuries. At laſt the former Proprietor comes, and claims the Ground, he ſhows after what Manner his Predeceſſors were led to forſake their Country and Poſſeſſions. During all that Interval they had been abroad in another Land, where they fixed their Heart and Reſidence, without the leaſt View or Proſpect of ever reviſiting their native Soil, till by ſome Accident, like the former, Fortune led them back to the Country from whence they originally ſprung. Let any Man conſider ſeriouſly this Caſe, and conſult his own Heart about it, he will find this Claim to be againſt Nature and Reaſon. The Demand has no other Foundation but a *quondam* Property, long ago deſerted, and given over for loſt. 'Tis directed againſt a Perſon

Perſon whoſe Predeceſſors have been *bona fide* in Poſſeſſion Time out of Mind, and juſtly eſteemed themſelves truly Proprietors. A Demand of this Kind is obviouſly againſt Nature. The firſt Proprietor deſerted his Poſſeſſion, loſt his Affection to it, whereby as to all real Effects the Caſe comes to be the ſame as it had never been his. Another Perſon is ſuffered peaceably and honeſtly to take up the deſerted Poſſeſſion: He has no Reaſon to be ſuſpicious of this, more than of any other vacant Spot of Ground. His Affection grows to the Subject as his own Property; it becomes as ſtrong as he had bought it, nay, we may ſuppoſe he actually bought it, or obtained it by ſome other the moſt indiſputed Title. If the Law thereafter take it from him, it takes it from a Man, who cannot help thinking it unjuſtly tore from him, and who is thereby made a real Sufferer, to be given to another whoſe Pretenſions are quite wore out by Courſe of Time; and who is thus made *locupletior aliena jactura.* It can never be in the Law of Nature to indulge ſuch Hardſhips. It will be granted to be perfectly agreeable to humane Nature, that a Man indulge his Affection in ſuch Acquiſition. At firſt indeed, 'tis reaſonable to have ſome Doubts; theſe muſt wear off neceſſarily by the Courſe of Time, till at the long Run, the Poſſeſſor acquires the moſt ſolid Affection to, and Security in the Thing as his own. After ſo good a Foundation built in humane Nature, it never can be agreeable to the *Laws* of that Nature, to overturn ſuch a Foundation, by wreſting the Property from him; which were in other Words to ſay, That Nature dictates to be ſecure, and inſecure at the ſame Time.

The Matter comes here in one Word, the longer a Man poſſeſſes *bona fide*, the greater is his

his Security in the Thing, and Affection to it, till at length both become extreme. The Laws of Nature ought to protect every Poſſeſſor in reaſonable Security and Affection, which are of Nature's Growth, and not prefer him who has neither Security nor Affection. And thus by the Law of Nature, "A "long continued *bona fide* Poſſeſſion is a good "Title for acquiring Property."

It will conduce to the better illuſtrating of this Doctrine, if we take a View of the Effects of *bona fide* Poſſeſſion in its full Extent. The *bona fide* Poſſeſſor from the very Beginning is allowed to conſume the Fruits. The true Proprietor, let him put in his Claim when he will, has no Demand upon that Score. The Reaſon is, That as Property is introduced for the Conveniency and Support of Mankind, 'tis better any Man conſume the Fruits than that they be loſt to every Body: And therefore are given to the Poſſeſſor, who has a Title ſuch as to convince the Judges, that he was in *bona fide* to conſider himſelf as Proprietor. And as from the Nature of the Thing, Titles to Property are extremely uncertain, 'tis the Intereſt of Mankind, that they be keeped ſecure againſt After-reckonings of this Nature. 'Tis but enlarging this Thought to give Security to the Poſſeſſor, after great Length of Time, in the Thing itſelf, when the former Poſſeſſor has loſt his Affection, and all Thought of Recovery. For is not all this anſwering the true Deſign of Property, by making it ſubſervient to the Uſes and Neceſſities of Mankind? Are not theſe very Laws anent Property, *ſciz.* That it cannot be taken away without Conſent of the Owner, and ſuch like, introduced for the ſame End, thoſe very Laws that ſeem moſt oppoſite to this Doctrine?

But what is the Reſult of all? None other but this, That the End is the true Touchſtone to judge of the Preference of the Means. Thus in common Caſes the Rule ought to be ſacred, That no Man's Property be tore from him without his Conſent; becauſe otherwiſe the great End propoſed by Appropriation could not be brought about. But then, if in any Circumſtance the rigid Obſervance of this Rule ſhall be ſo far from conducing to the End propoſed, that it will be flying directly in the Face of it; in that Circumſtance it muſt yield to ſome other Rule more adapted to bring about that End. And he who in that Circumſtance does notwithſtanding adhere to the Rule, is guilty of the plain Abſurdity of preferring the *Mean* to the *End*.

Preſcription neceſſarily preſuppoſes two Perſons, one who loſes, and another who gains thereby. This is evident; for all the Ways known in Law to deprive a Man of any of his Rights and Privileges are in Favours of, and with a View to the Intereſt of others. Preſcription is of two Kinds, the POSITIVE, whereby is gained a Power over the Property or Perſon of another; the NEGATIVE, whereby one loſes his own Rights or Privileges. To determine what Rights fall under the negative Preſcription by the Law of Nature, it is obvious, in the firſt Place, That it is a legal Extinction of Rights of Property, which go thereafter to the firſt Occupier. 2*do*, All Burdens upon the Perſon, or Effects of another fall under it, which operating an Extinction only, not a Transference, ſtand in Need of no poſitive Act of the Acquirer of his Liberty, to produce the full Effect; becauſe if the Creditor's Right fall, the Debitor cannot remain bound. But as to all Acts of native Liberty, perſonal Privileges,

and

and ſuch like, which in benefiting ourſelves interfeir not with others, and make no Reſtraint upon them, ſuch cannot be loſt by Diſuſe, becauſe they involve but the Idea of one Perſon, and concern not others, whereby ſuppoſing them capable to be cut off by Preſcription, ſtill it would come to nothing, becauſe no Mortal could be founded in an Intereſt to alledge upon it, the perſonal Objection of *jus tertii* would ever lie againſt him. Thus, if a Perſon ſhall keep Silence a hundred Year, confine himſelf to a Place, or to a certain Method of Action, there is nothing in Nature to oblige him to continue a Moment in the ſame, longer than he wills, unleſs another by Uſe, Conſent, or otherwiſe, has acquired a Power over him to reſtrain his native Liberty. 'Tis for the ſame Reaſon, that a Man cannot tie himſelf down, even by the moſt expreſs Conſent, unleſs declared in Favours of ſome third Party. Thus then Rights preſcribe only negatively, which involve the Conſideration of two Perſons. But there is here a remarkable Limitation, which makes a conſiderable further Reſtriction upon Rights preſcribable; which is, That *perſonal Powers* or *Faculties*, ſuch as *Faculties to burden*, *to alter* or *innovate*, *to revoke*, &c. though inferring a *Burden* upon others, are not loſt *non utendo*. The true and adequate Reaſon whereof is this, that it being involved in the very Idea of a *Faculty*, to be exerced *quandocunque* at the arbitrary Pleaſure of the Poſſeſſor, as well now as afterwards, as well afterwards as now, *Neglect* or *Deſertion*, the Cauſes operative of Preſcription, can never be inferred ſimply from Forbearance. In *Rights* the very Deſign of which is to be made effectual *quam primum*, ſuch as Obligations for Money, or other Preſtation, Forbear-

ance to act upon theſe, implies *Neglect* and *Dereliction*. But where it is the very Intention of the Thing, that the Matter ſhould lie over, where it is intirely arbitrary, whether the *Power* be exerced this Day or hereafter, the forbearing to act at preſent cannot infer in the Nature of Things *Neglect* or *Dereliction*. Theſe Limitations upon the negative Preſcription, *ſciz.* Acts of perſonal Liberty, that imply but one Perſon, and Faculties of the Nature to be exerced *quandocunque*, are both of them generally comprehended under the Expreſſion of *res meræ facultatis*, though very different in their Natures and carefully to be diſtinguiſhed. As for the *poſitive Preſcription*, all Rights may be acquired thereby that are capable of Poſſeſſion.

'Tis obvious, that *poſitive Preſcription* can in no Caſe exiſt without the *Negative*; for it is through *Neglect* and *Dereliction*, that the poſitive Preſcription gives any Man Power over the Effects or Perſon of another. But the negative Preſcription may well ſubſiſt alone, and work its whole Effect without Intervention of the poſitive Preſcription. Thus Property is loſt negatively *non utendo*; and if the Poſſeſſor has the poſitive Preſcription, it is a ſtrong Confirmation of his Title, but not abſolutely neceſſary. The proper Subjects therefore of the poſitive Preſcription are *Servitudes perſonal* or *real*, whereby Reſtraint is impoſed upon Perſons or their Effects, which can by no Means be done by the negative Preſcription alone.

It was neceſſary to lay down the Principles of the Law of Nature relating to this Matter; which will ſerve to guide us in the Ambiguities of our own Law, as well as where it is totally deficient.

Having

Having explained the Doctrine of Preſcription, as founded in the Law of Nature: Before we come cloſs to our own Practice, it may be proper to premiſe, that, beſides the above Conſiderations, there are many others ſufficient to have influenced our Law-givers to introduce a Statute of this Nature. Nothing more conduces to the Well-being of a Society, than that private Property be fix'd and aſcertained. It tends to quiet the Minds of Poſſeſſors and encourages Induſtry, which of all Things ought to be moſt cheriſhed. Beſides it cuts off in a great Meaſure a Sort of Pleas pernicious above every Thing to Society, *viz.* ſuch as are the Reſult of Forgery, Fraud, and under-hand Dealing. Such Claims being generally laid over upon the Proſpect, that by Length of Time, the proper Means of Diſcovery ſhall be evaniſh'd, or the real Exceptions competent againſt them be forgot. Taking then Preſcription in all theſe different Views, it is ſo far from being odious, that perhaps there never was a Conſtitution better founded, whether it be conſidered in the View of Equity or Expediency. The Expediency is apparent. The Equity is clearly ſhown above, ſince the indulging of old forgotten Claims comes truly to this, Making the Claimant *locupletior aliena jactura.* And 'tis extremely curious to obſerve in this Caſe, as well as in many others, how common Senſe and the Dictates of Nature get inſenſibly the better of falſe Principles imbib'd by Reading or Education. In all our Authors it is held and allowed, that Preſcription is odious; yet our Court of Seſſion has been in the conſtant Uſe of extending, rather than limiting the Statutes thereanent. And at this Day, as we ſhall ſee afterwards, 'tis eſtabliſhed in Practice, that many Things

Things fall under Preſcription, which have no Sort of Warrant from the Acts of Parliament.

Tho' Preſcription be founded in the Law of Nature, it muſt be obſerved, that no preciſe Time is fixed to it by that Law. This is in ſome Meaſure arbitrary, left to the Regulation of every different Society for it ſelf. Our Law, with great Judgment, has fix'd upon forty Years. A ſhorter Time might poſſibly have been reckon'd too great a Limitation upon Proprietors. A longer Time was unneceſſary; for exceeding the ordinary Memory of Man, in that Reſpect it is equivalent to the longeſt Duration. And the Man, who during ſuch an Extent of Time neglects or overlooks his Affairs, would probably reap little Benefit from a longer Indulgence.

It does not appear, that our Statutes or Practicks have much receded from the Law of Nature, except in one particular Preſcription of Rights of Property. By the Law of Nature, the negative Preſcription is as effectual to cut a *Proprietor* out of his Right as a *Creditor*: Yet without a poſitive Preſcription, ſince the Effect would be to make the Subject *caduciary*, to go to the Fisk or firſt Occupier, our Law, favouring the *quondam* Proprietor, allows him to take it up *quandocunque*, as long as not appropriated by the poſitive Preſcription. And thus, with us, "There is no ſuch Thing as a negative Preſcription of Rights of Property abſtracted from the poſitive Preſcription."

'Tis commonly held, that in our Law *bona fides* is not a Requiſite of the poſitive Preſcription. The Lord *Stair* ſays, "That in *Act* 1617, there is no "Proviſion concerning the Manner of the Entry, "whether it be *bona fide*, peaceable or lawful?" § 19. *h. t.* If this be abſolutely fixed in our Practice,

Practice, there's an End of the Queſtion. If not, the following Conſiderations may not be quite impertinent. 1*mo*, If *bona fides* is eſſential to the Nature of Preſcription, as has been fully laid down above; it muſt ever be underſtood included, unleſs where expreſly excluded. 2*do*, In this very Act 'tis virtually, if not expreſly included. For to what other End is a Title by Charter and Saſine made eſſential, if not to eſtabliſh a *bona fides*? Let a Man examine ſeriouſly all the Reaſons for Preſcription political and legal, and he ſhall not be able to point out any other View the Legiſlator could have in making a Title neceſſary to Preſcription. This will be more plain, when we take a View of the *Roman* Law. There a *juſtus titulus*, abſtracting from *bona fides*, was reckoned a Requiſite of the poſitive Preſcription, as much as it is with us. Yet when we come to examine that Matter to the Bottom, it will appear, that *juſtus titulus* was truly no diſtinct Requiſite of Preſcription; That it was only ſo far conſidered, as to make Evidence of a *bona fides*; and that where there was otherwiſe Preſumption or Evidence of *bona fides*, Preſcription was ſuſtain'd, without any Title at all. All this is clear from the Authority of *Africanus*, one of the beſt *Roman* Writers, *l.* 11. *pro emptore.* His Words are, *Quod vulgo traditum eſt*, Eum, qui exiſtimat ſe quid emiſſe, nec emerit non poſſe pro emptore uſucapere: *Hactenus verum eſſe ait, ſi nullam juſtam cauſam ejus erroris emptor habeat. Nam ſi forte ſervus vel procurator, cui emendam rem mandaſſet, perſuaſerit ei ſe emiſſe, atque ita tradiderit; magis eſſe, ut uſucapio ſequatur.* To the ſame Purpoſe are, *l.* 14. *pro empt. l. ult.* § 1. *pro ſuo.* And upon the ſame Footing it is, that

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one erroneouſly conceiving himſelf Heir, preſcribes a Right to the Heritage by *Addition*. In this Caſe *uſucapio* proceeds upon *bona fides*, without any Colour of a Title. See *Voet*, *T. pro heredere*, § 2. If then it come out that in the *Roman* Law, the *juſtus titulus* is truly no diſtinct Requiſite of Preſcription more than it is in the Law of Nature; Why ſhould we go about to eſtabliſh it as the only Principle, when our Law ſays no ſuch Thing, to degrade the *bona fides*, in Subſerviency to which the *juſtus titulus* ought alone to be conſidered. 3*tio*, The Caſes juſt now mentioned from the *Roman* Law, without Controverſy, would equally obtain in our Practice. The *Uſucapio pro herede*, particularly is eſtabliſhed by expreſs Statute, *P.* 1617. *C.* 13. and the Preſcription limited to 20 Years. Here then by Authority of Parliament, we have the *bona fides* made the Foundation of Preſcription, without the leaſt Pretence of a Title. What can be anſwered to theſe Examples, by thoſe who hold that a Title is neceſſary, and not *bona fides*? 4*to*, *Bona fides* is abſolutely neceſſary *ad lucrandos fructus perceptos ex re aliena*: Would it not be abſurd to adjudge the Property to a *mala fide* Poſſeſſor, who at the ſame Time is in ſo unfavourable a Situation in the Eye of Law, as even to be made accountable for the Fruits long ago conſumed? 'Tis a common Caſe to indemnify a Poſſeſſor as to the Rents, who at the ſame Time is made to reſtore the Property: So much leſs favourable is the one Claim than the other. But it would be ſtrange indeed to ſuſtain a Title as ſufficient to retain the Property, which is not even ſufficient to retain the Fruits already conſum'd. This laſt Argument I acknowledge appears to me in a very ſtrong Light. However, if it ap-

pear not ſo to others, I ſhall be the leſs ſurpriſed in that they have a Support from the *Roman* Law. See *l.* 48. § 1. *A. R. D.* This Text, and others to the ſame Purpoſe, would ſtagger me extremely, were it not, in my Opinion, an Argument of as great Weakneſs on the one Hand to give implicite Faith to any human Authority, as on the other, wantonly to neglect or contemn all human Authority. Sure I am, the cool and diligent Enquirer, who, in Search after Truth, uſes his own Reaſon, and the Lights that Nature has afforded him, is more to be commended, and offers a more agreeable Incenſe to the Memory of the great Men who write upon the *Roman* Law, tho' in his Judgment he may ſometimes argue them of little Slips and Errors, than the abject Mind does, which blindly follows where-ever they chuſe to lead. So much was neceſſary by Way of Apology, for venturing to ſet up private Judgment, againſt publick and indeed, generally ſpeaking, ſo well founded Authority. But to return to my Subject.

Here we have a notable Difference in our Law betwixt the negative and poſitive Preſcription. *Bona fides* is neceſſary in the one, not at all in the other. Obligations are loſt, merely by Diſuſe and Dereliction, without Neceſſity of alledging a *bona fides* in the Debitor, or any Thing ſimilar to a poſitive Preſcription of Liberty. For tho' the former Proprietor is reſtored againſt the Fisk, the Creditor is not reſtored againſt his Debitor; becauſe *Liberation* is as much more favourable than *Obligation*, as private Property is more favourable than Confiſcation. This explains the Deciſion, *Fountainhall*, 7th *December* 1703, *Napier* contra *Campbell*, where it was found, That after the 40 Years Pre-

ſcription, the Defender was not obliged to give his Oath, whether the Debt was yet reſting owing; and tho' he ſhould confeſs it, that he was not in *foro humano* liable. Poſſibly it were to be wiſh'd, we had deviated from the Law of Nature in the negative Preſcription of *Obligations*, as far as we have done in the negative Preſcription of *Property*. *Bona fides* is abſolutely requiſite in the Acquiſition of Property by Preſcription, without which the former Proprietor is not cut out by whatever Diſuſe. Might it not be thought as reaſonable, that the Debitor ſhould not be reſtored to his Liberty, unleſs by a *quaſi* Poſſeſſion of Exemption upon a *bona fide* colourable Title. And were this made the Rule, the negative Preſcription would be as ſtrongly founded in Equity, as it is in ſtrict Law. 'Tis a great Hardſhip to oblige a Man to pay a Debt he never was conſcious of, having abſolute Affection and Security upon the Side of Freedom: 'Tis no Hardſhip to refuſe Action to a Creditor, who had perhaps never conſidered himſelf as ſuch, and never built Hope in the Claim. And thus the Rule of Equity might apply here, as well as in the poſitive Preſcription, *ſciz. Quod nemo debet locupletari aliena jactura.* Hitherto, I ſay, we have thought proper to adhere ſtrictly to the Law of Nature; The Alteration here offered may poſſibly obtain Footing in our Practice.

The poſitive Preſcription may be defined, *A legal Acquiſition of Property or Servitude, by Means of a forty Years* bona fide *Poſſeſſion,* qua *Proprietor, or* qua *having a Right to the Servitude: Join'd with a total Diſuſe or Neglect of the righteous Owner during that Time.* The negative Preſcription is, *A legal Extinction of the Creditor's Intereſt, by Mat-*

Means of a total Diſuſe or Dereliction for forty Years.

Every temporary Extinction of a Right is not Preſcription: That is only underſtood to be Preſcription, which extinguiſhes Rights deſign'd by the Law or Conſent to endure a longer Time. Thus the *annus deliberandi*, the three Years Preference given the Creditors of the Defunct, the Legal of Adjudications, and ſuch like, fall not within the Compaſs of this Eſſay.

The negative Preſcription is not a *real* Extinction like Payment, bur only a *perſonal* Excluſion of the Purſuer, being an *extrinſick* not *intrinſick* Exception. This is plain from its Nature, being directed againſt the Purſuer's Negligence; and therefore can only amount to a *perſonal* Exception againſt him. Thus in an Adjudication, or other Right diſponed to two different Perſons, one after another, the negative Preſcription may run againſt one of them, tho' the Adjudication it ſelf be ſaved from Preſcription, by the other Diſponee. 26. *November* 1728. *Fraſer* contra *Mackenzie*.

Upon this Principle depends the Reſolution of the following Queſtions. An unintimate Aſſignation lies over 40 Years; Preſcription has run againſt the Cedent, but interrupted *quoad* the Aſſigny by Minority. Has the Aſſigny thereafter intimating a good Title? *R. D.* The Debt was *funditus* extinguiſhed in the Perſon of the Cedent. *Anſ.* Preſcription is only an *extrinſick* Exception, denying Action to the Cedent, but leaving the Debt intire, to be made effectual by the Aſſigny.

The like as to a Diſpoſition upon Death-bed of an heritable Debt, which is loſt as to the Diſponee, by the Laple of 40 Years. The Heir, with reſpect

to whom the Preſcription was interrupted, by Minority or otherwiſe, has a good Action againſt the Debitor, notwithſtanding the Debt is preſcribed *quoad* the Diſponee.

The ſame Principle determines the Queſtion, as to the Preſcription of *acceſſory* or *cautionary* Obligements. Here we muſt diſtinguiſh betwixt an additional Security ſtrictly *acceſſory*, or *ſubſidiary*, and an *expromiſſory* Security, *i. e.* the acceding of a new *principal* Obligant. In the firſt Caſe, becauſe ſuch ſtrictly acceſſory Obligements can have no Self-ſubſiſtence, by whatever Means the *principal* Obligation is cut off, its Shadow the *Acceſſory* falls of Courſe: But when ſeveral Co-obligants bind at different Times, for the ſame Debt, every ſeveral Co-obligant will be free, by a ſeveral Courſe of Preſcription; for Preſcription is not like Payment, an Extinction of the Debt it ſelf, operating only an *extrinſick* Exception *perſonal* againſt the Purſuer.

From this Principle it alſo follows, That Preſcription is not of the Nature of a *Preſumption*, inferring, that the Debt is extinguiſhed, by Payment or otherwiſe, which ſome hold: For in the above Example, *Fraſer* contra *Mackenzie*, if the Adjudication were preſum'd extinguiſhed, by Payment or Intromiſſion, in the firſt Diſponer's Perſon; this would neceſſarily affect the ſecond Diſponee, becauſe an Adjudication extinguiſhed, by Payment in one Aſſigny's Perſon cannot ſubſiſt in the Perſon of any other. There is a ſecond Argument to evince this: Preſcription has ſuch an Effect againſt the Purſuer's Claim, that it cannot thereafter be reared up, by the Debitor's Oath of Knowledge, that it is ſtill reſting owing. Does not this evince, That Preſcription is not a Preſumption at all, whether *juris & de jure*,

jure, or *juris* only? For 'tis obvious, That every legal Preſumption, however ſtrong, muſt yield to a demonſtrative Proof, by the Debitor's Oath. There is ſome better Colour for putting the poſitive Preſcription upon the Footing of a *Preſumption*. The Narrative of the Act ſeems to favour this: But as Preſcription is ſupported, by the Law of Nature, it has a more ſolid Fundation, than a *Preſumption*, a Creature of the Law, in this Caſe, no better than a Fiction.

It goes next in order, to conſider what Things fall under the negative Preſcription. 1*mo*. It is plain, from the two Statutes, *P.* 1469. *C.* 28. and 1617. *C.* 12. joined with the Nature of Preſcription, above laid down, that all Burdens, eſtabliſhed againſt *Perſons* or *Things*, preſcribe *non utendo*, ſuch as Obligations, mutual Contracts, Infeftments of Annualrents, Wadſets, Servitudes, Diſpoſitions, Adjudications, *&c.* All of which include the *Idea* of two Perſons, one who loſes his Right, and another who is thereby freed from a Claim or Burden. In a Queſtion upon this Head, it was found ſufficient to exempt the Defender's Lands, from the Juriſdiction of a Regality, that he had been free for the Space of 40 Years, never being inrolled, or cited by the Bailie, but ſtill by the Sheriff. *Stair* 23. *November* 1671. *Rolland* contra Laird of *Craigievar*. It was alſo found, That the Power of Repledging, from one Court to another, was loſt *non utendo*, by the negative Preſcription. *Fountainhall* 29. *January* 1712. Juſtices of the Peace of the Shire of *Air* contra Town of *Irvine*. 2*do*. Rights of Property ſuffer not the negative Preſcription. 24. *December* 1728. Presbytery of *Perth*

contra

contra the Magiſtrates of *Perth*. 3*tio*. Acts and Exertions of native Liberty, which make no Burden or Reſtraint upon others, including only one Perſon who has the Power, but none other againſt whom it is directed; none of theſe ſuffer the negative Preſcription. And if they did, it would be *jus tertii* to found upon it. Thus the Right of Blood never preſcribes. 'Tis true, that if another than the righteous Heir ſerve, the Law makes his Retour irreducible after 20 Years: But abſtracting from the poſitive Preſcription, the righteous Heir may ſerve *quandocunque*; no Mortal can be founded in an Intereſt to make Oppoſition. 4*to*. Powers and Faculties of the Nature, to be exerced *quandocunque*: Such as Faculties to diſpone, burden, alter, revoke, &c. Thus Reverſions ſuffer not the negative Preſcription. 'Tis involved in the very Nature of ſuch to ly over. The Man cannot be accuſed of Negligence, who wadſet his Lands Yeſterday, for not redeeming them to Day, or to Morrow. To oblige him to redeem them preſently, under the Hazard of Preſcription, would be going directly contrary to the Nature and Deſign of the Contract. Yet this ſeems to be laid down, Parliament 1617. *Cap*. 12. Unleſs it be referred to the poſitive Preſcription; which Interpretation is founded, both in the Nature of the Thing, and in the Act it ſelf. For if Reverſions be regiſtred, or incorporated within the Body of the Infeftment, the Act in this Caſe ſays, they never can preſcribe. Now it appears obvious, That this does only relate to the poſitive Preſcription. There is good Reaſon, that Reverſions incorporated or regiſtred ſhould be good againſt the poſitive Preſcription; and the ſame Reaſon will infer, that latent Reverſions ought not: But no

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good Reaſon can be given, if latent Reverſions preſcribe negatively, why they ſhould not alſo, tho' made ever ſo publick. Neglect and Dereliction are the Foundations of the negative Preſcription, and they muſt hold equally in both Caſes, to infer the negative Preſcription, or they muſt hold in neither, which is the more rational Scheme.

For the ſame Reaſon, a Donation betwixt Man and Wife may be revoked at any Time; and the Power of Revocation ſuffers not the negative Preſcription. *Fountainhall* 15. *January* 1697. *Turnbul* contra *Husband.* Upon the ſame Footing it is, That the Power to take Infeftment upon a Precept is not loſt by Delay; which while the Party is in Poſſeſſion of the Lands, or Superiority thereof, may *ad libitum* be done *quandocunque.* 4. *July* 1716. *Johnſton* of *Corbead* contra *Johnſton* of *Newtoun.*

In mutual Contracts, Preſcription can have no ſuch Effect, as to liberate the one Party, while the other remains bound: If the one demand Performance, he muſt fulfil alſo his Part; Becauſe Preſcription does not change the Nature of Contracts, by tranſforming them into other Species; it cuts them off ſimply, or allows them to ſtand ſimply. Now as the Nature of a mutual Contract is *one* and *indiviſible*; to oblige the one Party to perform, while the other is free, would be intirely to change its Nature, by transforming it into a *ſimple* Obligation, which Preſcription cannot do, being made to *deſtroy*, not to *eſtabliſh* Obligations. Thus in a Contract of Sale, for Example, which has lien over 40 Years without Implement, but keeped alive by the one Party, thro' Minority or Interruption, if the Party, againſt whom Preſcription has not run, inſiſt for Implement, he muſt at the ſame Time perform the

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mutual Cauſe; becauſe if he purſue upon the Contract, he muſt take it as it ſtands. But then the Preſcription has this Effect, that the other Party cannot purſue upon it, becauſe, as to him, it is loſt *non utendo*. And thus Preſcription may run againſt one Party in a mutual Contract, and not againſt the other; but never ſo as to divide the Preſtations; the Contract muſt be fulfilled *in totum*, or not at all.

'Tis commonly held, That a Right of Peerage does not ſuffer the negative Preſcription: But of this there may be a Doubt. It cannot be put upon the Footing of a *perſonal Quality*, ſuch a one as no Perſon has an Intereſt to object Preſcription againſt; becauſe the firſt Peer being removed, the ſecond in order attains the firſt Place. 'Tis true, Peerage is not a Burden upon any Perſon or Thing; but neither is Property; and yet by the Law of Nature, it ſuffers the negative Preſcription: Our Law indeed, *in favorem*, reſtores the former Proprietor to his Right; but that Favour cannot be pled in this Caſe, more than in that of a Creditor: There is no Reaſon for reſtoring one Peer againſt another, more than for reſtoring a Creditor againſt his Debitor. It cannot be put upon the Footing of a *Faculty*, to be exerced *quandocunque*. A Right of Peerage is of the Nature to be capable of Neglect and Dereliction, as well as a Right of Property, or of Credit. *Laſtly*, Tho' *jus ſanguinis* preſcribes not, which might be reckoned of the ſame Nature with this in Queſtion, that holds only, where it is *jus tertii* for any Mortal to make the Objection; no Perſon having an Intereſt to hinder an Heir to repreſent whomever of his Prdeceſſors. If the Right taken up by the Heir be of the Nature of an Obligation, the *quondam* Debitor ſuffers nothing, becauſe he is already

already free, by the negative Preſcription; if a Right of Property, the preſent Poſſeſſor is ſafe, by the poſitive Preſcription; and if that be not run, the Heir has Acceſs upon a ſeparate *medium*, to wit, That Property preſcribes not negatively; if it be a perſonal Faculty, that interfeirs not with others, or if it be of that Nature to be exerced *quandocunque*, there is nothing to hinder the Heir to take it up. Now this applies not to a Right of Peerage, the Preſcription of which third Parties have Intereſt in equally, as where the Preſcription is of Obligations.

Reduction upon the Head of Death-bed was found to ſuffer the negative Preſcription. *Forbes* 18. *March* 1707. *Murray* contra *Irving*. But in that Deciſion, Mention is not made of what Nature was the Subject diſponed upon Death-bed. If it was an heritable Bond, there can be no Queſtion about the Deciſion; for this Reaſon, that the Heir could have no Intereſt to purſue ſuch a Reduction againſt the Diſponee, whoſe Right againſt the Debitor himſelf was cut off *non utendo*: And if the Diſponee took a Document upon the Right, and ſaved it from Preſcription, that cannot benefit the Heir; but if the Heir himſelf uſed Interruption, there is a Difficulty, which reſolves into this, Whether a Death-bed Deed be *ipſo jure* null, or good until it be challenged by Reduction? If the laſt, the Reduction preſcribes *non utendo*: If the other, the Subject remained *in hæreditate jacente*; and there could be no Neceſſity of a Reduction. If now the Diſpoſition upon Death-bed was of Lands, the ſame Diſtinction muſt be taken along; for upon Suppoſition the Death-bed Deed was good until Reduction, it follows, That the Reduction is cut off, by the negative Preſcription; if null, as a Right of Pro-

perty preſcribes not *non utendo*, the Heir may take it up when he will.

The negative Preſcription of annual Preſtations is a Subject abſtruſe in itſelf, and not at all clear'd by Writers or Deciſions. To avoid the Labyrinth theſe naturally lead us into, it will be the beſt Way to abſtract from them for the preſent, and endeavour to draw our Concluſions from well founded Principles. To begin, we ought nicely to diſtinguiſh amongſt four Things. 1*mo*, The Contract, or other legal Deed which is the *Cauſe*, and whereby the Right is eſtabliſhed. 2*do*, The Writing, which is the *Evidence*. 3*tio*, The *Right* it ſelf eſtabliſhed. 4*to*, The Conſequences of the Right. For Example, in a Loan of Money, the Fact of Delivery of the Sum lent to the Debitor with his Conſent to repay is the *Cauſe*. The Bond is the *Evidence*. There is a *Right of Credit* eſtabliſhed; the Conſequences are, 1*mo*, A Power to oblige the Debitor to repay the Sum *quandocunque*. 2*do*, A Power to oblige him to pay Annualrent in the mean Time. Of theſe four 'tis the Right itſelf that is the proper Subject of Preſcription. 'Tis obvious, that *Conſent* or *Evidence* are not capable of Preſcription. And as for the *Conſequences* of the Right, if the *Right* itſelf remain firm and unſhaken, its Conſequences are a Shadow that muſt ever attend the Subſtance. If the Right itſelf fall, 'tis bootleſs to talk whether the Conſequences be preſcribed, ſince a Shadow cannot exiſt without the Subſtance. Having gained this Point, that the *Right* itſelf is the proper Subject of Preſcription, let us now put the Caſe of a Sum of Money lent, repayable at two different Terms; the Creditor inſiſts for Payment forty Years after the firſt Term's Pay-

Payment fell due, but within forty Years of the ſecond Term. *Quæritur*, Whether the remaining Half that fell due the ſecond Term, can yet be exacted? The Anſwer is, That it cannot, becauſe the *Right* itſelf, the *jus crediti* is cut off by Preſcription; after which there can be no Purſuit upon the Bond. The Creditor has been negligent for the Space of forty Years, ſince the Time that Action was firſt competent thereupon, the Law from this infers, that he has derelinquiſhed his Right, which brings him to the ſame Situation as it never had been granted; the Right itſelf falls with all its Conſequences. Upon the ſame Medium it is, that a Bond bearing Annualrent having lien over forty Years, not only the principal Sum, but all the intermediate Annualrents fall to the Ground, tho' none of them have been due forty Years, and poſſibly ſome of them not a ſingle Month. Thus the Matter was determined in the *Roman* Law, and upon the ſame Principles. See *L.* 26. *C. de Uſur.* The Words are, *Eos, qui principali actione per exceptionem triginta, vel quadraginta annorum, ſive perſonali, ſive hypothecaria ceciderunt* [*jubemus*] *non poſſe ſuper uſuris, vel fructibus præteriti temporis aliquam movere quæſtionem, dicendo ex iiſdem temporibus eas velle ſibi perſolvi, quæ non ad triginta, vel quadraginta præteritos annos referuntur, aſſerendo ſingulis annis earum actiones naſci:* principali *enim actione non ſubſiſtente, ſatis ſupervacuum eſt ſuper uſuris, vel fructibus adhuc judicem cognoſcere.* From the ſame Principle it flows, that if a Creditor take Document upon his Right, the *Right* itſelf is ſafe from Preſcription with all its *Conſequences*; which is inſinuated in the firſt Act anent Preſcription, and cleared by Practice. Thus negative

Preſcription is ſaved as to the whole, the Creditor doing Diligence againſt any one of the Principals or Cautioners. *Stair, Dirleton, 18th December 1667, Nicolſon* contra Laird of *Philorth. Forbes 23d February* 1714, Earl of *Marchmount* contra *Home.* Thus in an Infeftment of Annualrent reaching two Tenements, Diligence done againſt the one, or Payment made by the Debitor, ſaves Preſcription as to both, which was found, though the Annualrent was conſtitute upon the two Tenements by two different Saſines. *Stair, Gosford, 22d June* 1671, Lord *Balmerino* contra *Hamilton.* The like in a Thirlage of *omnia grana creſcentia* eſtabliſhed by Writ, where it was found, That the Defender having grinded a Part of his Corns at the Mill to which he was thirled, this was ſufficient to ſupport the Aſtriction for the whole; tho' there was a Deſuetude as to ſome Particulars comprehended in the Writ, above the Space of forty Years. *Durie, 26. June* 1635, Laird of *Waughton* contra *Home.* All which tend to ſhew, that there is no ſuch Thing as a diſtinct Preſcription of the *Conſequences* different from that of the *Right* itſelf. All tends to this Point, "The "Right itſelf falling, it falls with all its Conſe- "quences; the Right itſelf being ſupported, it is "ſupported with all its Conſequences." It follows alſo as a plain Conſequence of the ſame Principle, That if a Creditor take Document upon his Bond, by receiving Payment of any Year's Annualrent, or any Part of the principal Sum, this muſt be a good Interruption not only as to the principal Sum itſelf, but as to all preceeding Annualrents; becauſe the Right is thereby ſupported, which ſupports all its Conſequences. And ſo it was determined, *Stair* 22. *July* 1671, *Blair* contra *Blair.* This Deciſion indeed was thereafter altered, *7th February* 1672 *inter eoſdem*,

and

and the quite contrary found. Upon this reaſoning, that though Payment either of the Principal or Annualrent, does interrupt Preſcription of a Bond as to the principal Sum; yet the Annualrent being *annua præſtatio*, every Year does infer a diſtinct Obligation, and every diſtinct Year's Annualrent does preſcribe by forty Years Silence: So that the Payment of the ſubſequent Annualrent, or a Part of the Principal, does not interrupt the Preſcription of any ſingle bygone Year's Annualrent, if there was no Purſuit upon that Year's Annualrent during the Courſe of Preſcription. I cannot perſuade myſelf that this is juſt Reaſoning. The Error ſeems to lie here, that every Year's Annualrent is conſidered as a diſtinct *principal* Obligation, not *depending* upon, or *conſequential* to the Right whereby the principal Sum is eſtabliſhed; whereas it is as direct a *Conſequence* of the Right of Credit, as the Penalty is, or any other *acceſſory* Stipulation. To try this reaſoning, let us examine where it will carry us. The Obligation for Annualrent is a diſtinct *principal* Obligation; therefore it is not interrupted by Document taken upon the Right for the principal Sum. Therefore, 2*do*, Of neceſſary Conſequence it preſcribes not with the principal Sum, but has its own ſeparate Preſcription. And ſo though a Bond be cut off by a forty Years Negligence, all the Annualrents within the forty Years may yet be demanded, expreſly contrary to the above Text of the Civil Law, founded in the moſt ſolid Principles. To ſum up this Diſpute, the whole comes here, if Annualrent be a diſtinct *principal independent* Obligation, it muſt have a ſeparate Preſcription from that of the principal Sum, whereby the principal Sum may be preſcribed while the by-

gone

gone Annualrents remain due; and Preſcription of the principal Sum may be interrupted without interrupting the other. If Annualrent be an *Acceſſory*, a *Conſequence* depending upon, and flowing from the *jus crediti*, eſtabliſhed by the Bond and Contract in the Purſuer's Perſon, which it unqueſtionably is, both the above Poſitions muſt be wrong; Preſcription of the one muſt cut off the other, and Interruption of the one ſupport the other, equally as in the Caſe of Infeftment of Annualrent eſtabliſhed over two Tenements, or againſt two Debitors; and yet Payment by one Debitor, or out of one Tenement, is juſt as diſtinct a Preſtation from the Payment made by the other Debitor, or out of the other Tenement, as the Preſtation of Annualrent is diſtinct from that of the principal Sum or Penalty.

Having premiſed theſe Principles, it is Time now to take a View of the Deciſions relative to this Point. And, 1*mo*, A Liferentrix having lived many Years after her Husband's Deceaſe, without demanding her Annuity; in an Action at her Repreſentative's Inſtance for the Annuities falling due within the Years of Preſcription; The Lords found, That there being no Action intented for Payment of the Liferent for forty Years after the Huſband's Deceaſe, the RIGHT of Liferent, and the Purſuer's Claim thereupon, was preſcribed. *Forbes 6th July* 1711, *Steuart* contra the Children of *Cuming* of *Pitoullie*. But in a ſimular Caſe of a Bond of Penſion granted to an Advocate, the Bond had lien over forty Years without any Thing done upon it, yet the bygone Penſions falling due within the Years of Preſcription, were decerned to be paid to the Creditors Repreſentative; upon this Footing, that every Year's Penſion was a ſeparate Obligation,

on, and run a different Courſe of Preſcription.---*July* 1730, *Lockhart* contra Duke of *Gordon*. Theſe two Deciſions hang not well together. The firſt ſeems to be well founded. There is alſo a Text in the *Roman* Law, which runs counter to our Doctrine; it is *L.* 7. § 6. *C. de Præſcript.* 30. *vel* 40. *ann. In his etiam promiſſionibus, vel legatis, vel aliis obligationibus, quæ dationem per ſingulos annos, vel menſes, aut aliquod ſingulare tempus continent, tempora memoratorum præſcriptionum, non ab exordio talis obligationis, ſed ab initio cujuſque anni, vel menſis, vel alterius ſingularis temporis computari manifeſtum eſt.* The Miſtake, with Submiſſion, ſeems ſtill to lie here, that every Term's Preſtation is conſidered as a diſtinct *principal independent* Right, equally as if granted by different Perſons, at different Times, in different Deeds, which is plainly a wrong Conception of the Matter. All theſe different Preſtations are the Effects of one Cause, *ſciz.* the Right eſtabliſhed in the Creditors Perſon by the Legacy, Promiſe, or other legal Deed. The Right here is as much *unicum & individuum*, as any that contains but one ſingle Preſtation. The Unity of the Right depends upon the Unity of the Contract. Where the Deed is one, which it always muſt be when done *unico contextu*, by a ſingle Act of the binding Faculty, the Right eſtabliſhed thereby muſt be ſimple and one, though complex in its Performance. For Example, An Obligation to pay ten Pound is one ſimple Obligation, though it may be implemented by diſtinct Performances of partial Payments. 'Tis the ſame, though the Performance be ſtipulated originally, to be at different Times, ſuch as a Stipulation for Annualrent, or other annual Preſtation; which Difference of Time in the Performance

formance does no more infer different or diſtinct Obligations, than the Obligation to build a Houſe, which muſt neceſſarily take up Time in the Performance, or any Right of Servitude, ſuch as common Paſturage, all of which are performed ſucceſſively in Time, and yet are *funditus* cut off by the Diſuſe of bare forty Years. Let us further illuſtrate this Matter by the Conſideration of a Tack, which though containing mutual and different Preſtations, both as to Kind and Time, is yet one Contract, one Right in the Contracters. The Matter then comes here; if the Right itſelf be cut off by Preſcription, *ſciz.* the Legacy or Contract, the annual Preſtations flowing therefrom, and depending upon it, muſt ceaſe of Conſequence.

To ſift this Matter to the Bottom, being of Importance, let us examine what further may be ſaid in Favours of this Diſtinction betwixt the Preſcription of Annualrents, and other yearly Preſtations, inferred from comparing theſe two Laws of the *Codex* together. If it be contended to ly here, that the *principal* Sum falling, the *acceſſory* Annualrent cannot ſtand; whereas, in other annual Preſtations, there is no *principal* Obligation to which they may be referred as *Acceſſories*, but each Preſtation is a ſeparate *Principal.* The Anſwer is, It is true, that after the *principal* Sum is extinguiſhed, no Annualrents can begin to exiſt. But as to the Annualrents due before the Preſcription run out, there is no ſuch Connection as to infer, that they muſt fall, becauſe the *Principal* falls. The ſolid Reaſon is, that there is a *Right* in the Creditor antecedent in the Order of our Ideas to the reſpective Claims of both *Principal* and Annualrent, from which *Right* theſe Claims flow, are Con-

Conſequences of, and depend upon. To *claim* is to *act*, and all legal Action preſuppoſes a *Right* in the Actor, which makes it legal. 'Tis this *Right* which ſuffers the negative Preſcription; and it being done away, there is nothing left to ſupport a Claim either for Principal or Annualrent. The very ſame Way in other annual Preſtations, a Bond of Penſion, for Example, there is an antecedent *Right*, that ſupports every reſpective Year's Claim, which being extinguiſhed, theſe Claims muſt all fall at once. If it be alledged, That every Year's Claim ariſes from a ſeparate independent Right, which ariſes annually; let it be conſidered, that Time alone cannot make a *Right* to exiſt. If it did not exiſt before, it cannot begin now by the Force of Time alone. The Penſion is *one*, ariſing from *one* Conſent, one Act of the binding Faculty. Even as much as a Right to a Sum bearing Annualrent is *one*, or a Right of Paſturage, or to oblige a Perſon *ad factum preſtandum*, which requires a Courſe of Time to Performance: Or even as a Right of Property, which involves many Powers and Preſtations, differing in Kind as well as Time. To ſhow that a Bond of Penſion is one Right, tho' containing the Performance of many Years, Let us conſider the Difference betwixt that Caſe, and a different Bond for every Year's Penſion renewed annually. In the laſt Caſe a Right ariſes and falls every Year, and all the different Bonds are quite independent and unconnected; whereas in the other Caſe a Right aroſe upon Subſcription of the Bond, which ſubſiſted equally and uniformly through all the Years it was deſigned to laſt, and fell not until running out of the laſt Year. 2*do*, If ſuch a Penſion be not allowed to be one Right, it

will be difficult to ſhow that one Year's Penſion is one Right, which is equally diviſible as 100 Years are, into Months and Days, and ſo on to *infinitum*.

To fortify this, let us apply to the natural Notions of Mankind, whether they are not apt to conſider a Right obtained by one Conſent in one Deed, as *one*? Whether of judging of one's own Neglect, he does not take it from forbearing to purſue upon the *Deed* the *Contract*, without dreaming to diſtinguiſh the particular Preſtations therein?

Thus as to the negative Preſcription of annual Preſtations, theſe two Concluſions appear to be well founded. 1*mo*, That the *Right* itſelf falling by Preſcription, it muſt fall with all its *Acceſſories* and *Conſequences*. 2*do*, That any Document taken upon the Right, according to Act 1469, *C.* 28. as it does preſerve the *Right* itſelf, ſo of Neceſſity it muſt preſerve all the *Acceſſories* and *Conſequences*.

Hitherto of annual Preſtations, where the Right itſelf is preſcribable. There remains ſtill behind another Branch to be diſcuſſed, *ſciz.* where the *Right* itſelf is not preſcribable, which is the noted Caſe of Teind, Feu-duty, *&c.* In this Caſe, tho' the Right itſelf fall not by Diſuſe or Dereliction, yet it is our conſtant Practice to cut down the Bygones preceeding 40 Years. Thus, I ſay, ſtands our Law; but if one ſhall go accurately to inquire into the Reaſon, it will not be found ſo obvious. The Footing, I apprehend, it is generally taken upon, is, That every Year's Preſtation is a *different* Right, which of Conſequence muſt have a *different* Courſe of Preſcription. But this, I acknowledge, I never could conceive; and that it is a wrong Conception

of

of the Matter, is pretty fully explained above. 'Tis obvious in all ſuch Caſes, tho' the Preſtations ariſe annually, yet there muſt be a *Right* antecedent in the Order of our Ideas, which ſupports each of theſe Preſtations, and upon which each Year's Claim is founded; which *Right* is as much *unicum & individuum*, as any Right can be that ſupports but one ſingle Performance. To take a cloſer View of this in the Matter of Teinds, in which indeed every Year's Preſtation bids as fair for being a *diſtinct Right* as any one that can be exemplified. 'Tis obvious in the firſt Place, That Vicarage-Teind has never been taken upon that Footing, otherwiſe it could never ſuffer a total negative Preſcription, which it unqueſtionably does: And 'tis plain, that Parſonage-Teind is as much *jus unicum & individuum*, as Vicarage. 2*do*, Parſonage-Teind is apparently conſidered as *jus unicum & individuum*, without which it could never be carried by the poſitive Preſcription. Were it otherwiſe, Poſſeſſion of Parſonage-Teinds for 40 Years might well exclude a Demand for Bygones, upon the Footing, that the *Fructus* are *bona fide percepti & conſumpti*; but could give no Right for Time to come, becauſe no Right can be carried by Preſcription, but that individually, upon which the Poſſeſſion was founded. The Concluſion of all is, That if a Right to Parſonage-Teinds be a *jus unicum & individuum*, Preſcription muſt run againſt it totally, or not at all. If the Right fall, it muſt fall with its Conſequences; if it ſtand, it muſt ſtand with its Conſequences.

After the ſame Manner, the Right to Feu-duties is *jus unicum & individuum*. The Right itſelf can never preſcribe, being inherent in the Superiority, which again being a Right to Lands, can never ſuf-

fer the negative Preſcripti n. The like of Tack-duties, which are conſtituted in one Contract, eſtabliſhed by one Conſent, one Bargain.

'Tis extremly true, that in theſe Examples there has been Neglect, Diſuſe and Dereliction; all that is neceſſary in the common Caſes to found the negative Preſcription. But *quid inde?* To ſay that the negative Preſcription in any particular Caſe runs not, is, in other Words, to ſay, That the Law reſtores him againſt his Neglect, Diſuſe and Dereliction; therefore the perſonal Objection of Preſcription lies not againſt him; Therefore he can inſiſt upon his Right *quandocunque*; And if he can inſiſt upon his Right, he can inſiſt upon it as it ſtands, and as it ſtood from the Beginning: For Preſcription alters not the Nature of Rights, transforms them not into other Shapes; it cuts them down ſimply, or allows them to ſtand ſimply. Thus in the Caſe of Feu-duty, ſince the Right of Superiority preſcribes not, neither can the Claim for the Feu-duties, whether againſt the Vaſſal, or againſt the Ground, which Claim is *inherent* in the Superiority, eſſential to it; and therefore not to be divided from it.

If now the Matter be put upon this Footing, "That by the Law of Nature, all Sorts of Rights "fall by the negative Preſcription, and among the "reſt Right to Lands and Teinds; and that our "Law, when it reſtores Proprietors againſt this "Preſcription, does it not totally, but only as to "Bygones within 40 Years, and in Time to come." The Difficulty is, 1*mo*, That this is but an arbitrary Scheme. For taking the Thing in this View, it appears more reaſonable, that the Preſcription ſhould be allowed to run with Reſpect to the whole Bygones from

from the preſent Time. For truly the Neglect and Dereliction would infer ſo much equally, as in the Caſe of a Bond bearing Annualrent, in which the Annualrents within 40 Years fall by Preſcription, as well as the Bond itſelf. And when we take a View of the Reaſon, why Right to Lands falls not by Preſcription, the Objection will appear in a ſtronger Light. A Man by our Law is reſtor'd to his Property, where it is not acquir'd to another by poſitive Preſcription, becauſe the former Proprietor is in a more favourable Caſe than the Fisk or firſt Occupier: But there is no Reaſon he ſhould be reſtor'd to Bygones, ſeeing Liberation is more favourable than Obligation, eſpecially taking along that Neglect on the one Side, without *bona fides* on the other, is ſufficient in the negative Preſcription. If then this Scheme come out to any Thing, it muſt come out thus, That Property in Lands is loſt by the negative Preſcription, as well as other Rights, whereby all its Conſequences and Acceſſories fall of Courſe. But that our Law *ob favorem* gives back the Property, as by a *new* Right, unleſs it has been acquir'd to another by Preſcription. 2*do*, There is another ſtrong Objection againſt the Scheme, which cuts off the Bygones only preceeding 40 Years. Which is, That as the Law is ſuppoſed to reſtore the Proprietor to the Bygones within 40 Years, becauſe of his Neglect with Reſpect to theſe of an older Date, It muſt follow, that if he has purged his Neglect by uplifting any Year's Duty within the 40 Years, ſuch a Document taken upon his Right muſt be an Interruption, even as to Bygones, for 40 Years preceeding the Date thereof. Now this will ſcarce be allowed, the contrary is the received Scheme, *viz.*

That

That every Year's Preſtation runs a diſtinct Courſe of Preſcription; and therefore, that the uplifting of one Year's Duty will not ſave another.

Conſidering this Matter in all its different Lights, the moſt rational Footing it can be put upon, ſeems to be, that the refuſing Action upon annual Preſtations preceeding 40 Years, does not at all ariſe from Preſcription, but from a quite different Foundation. The Law introduces a *Preſumption*, that every Man will demand what is due to him, at leaſt within 40 Years, and that if he delays longer, it is becauſe Payment has already been made. I am the more ſatisfied with this, from what I ſee in *Durie*, 15th *December* 1638, Laird of *Gairntully* contra Commiſſary of St. *Andrews*. "Where a Feu-"duty being demanded after 40 Years, it was found, "That this being a Debt owing by the Defender's "own Charter, he could not propone *Preſcription* "againſt the ſame; But the Lords thought it ex-"pedient, that the Purſuer ſhould reſtrict his Libel "to the Feu-duties ariſing within the laſt 40 Years." If this Scheme hold, it will follow, that the Purſuer has Acceſs in this Caſe to refer to the Defender's Oath, that the Duties even preceeding the 40 Years are ſtill reſting owing. Which, as above ſet forth, he has no Acceſs to do in the proper Preſcription. And thus Preſcription, in Caſes of this Kind, is preciſely of the ſame Nature with the quinquennial Preſcription of Tack-duties, *&c.* and triennial Preſcription of Merchant Accompts, *&c.* none of which truly are of the Nature of the proper Preſcription. They found not a perſonal Objection againſt the Purſuer upon the *Medium* of Neglect or Dereliction. They are nothing elſe but a *Preſumption* introduc'd by Law, that the Debt is ſatisfied,

which

which has this Effect to throw the *onus probandi* upon the Purſuer, that the Debt is ſtill reſting owing.

Thus far upon the Queſtion with Relation to Rights that fall not by Preſcription, whether at leaſt they ſhould not fall as to Bygones preceeding forty Years? We proceed now to another Queſtion with Relation to Teinds in particular, Why they ſhould not fall totally by the negative Preſcription? It is laid down by Lord *Stair* in his Inſtitutions, § 22. *hujus tituli, That a Right to Teinds may be preſcribed as well as other Rights by forty Years Poſſeſſion; but that a Right to bygone Teinds, being founded in publick Law, preſcribes not except as to Bygones before forty Years.* Thus in our Law, Teinds are ſubject to the *poſitive*, but not *negative* Preſcription: Yet it muſt be acknowledged, that the Reaſon given here for the Difference, is not quite ſatisfying. All Rights are founded in publick Law, as well as Teinds; beſides that publick Law has no more Relation to the *negative* than *poſitive* Preſcription. To take this Matter from the Beginning, 'tis obvious, that before the Reformation, while Teinds were the Patrimony of the Church, and not alienable, they were in no View preſcriptable, as being *extra commercium*, juſt as much as the *res ſacræ, ſanctæ & religioſæ* among the *Romans*. But the Caſe differed after the Abolition of *Popery*, Teinds continuing no longer the Patrimony of the Church, they were erected into temporal Lordſhips, gifted away to particular Perſons, and now plainly *in commercio*. 'Tis true, they continue ſtill burdened with a competent Proviſion to Miniſters: So far as that Bur-

Burden goes, they are ſtill *extra commercium*, and conſequently not preſcriptable. But as for the Intereſt the Laity have in Teinds, 'tis perhaps not eaſy to account why that Intereſt ſhould not ſuffer the *negative* as well as *poſitive* Preſcription. Let us ſuppoſe the Caſe, that a Perſon who is Titular of his own Teinds, diſpoſes upon the ſame by Way of Sale, the Purchaſer forbears during forty Years to inſiſt upon his Contract; it does not appear why the Contract ſhould not fall by Preſcription, and of Conſequence the Right to the Teind-duties: Nor is it any Way repugnant, that the ſame Teinds ſhould yet continue to be a ſubſiſting Subject, liable to the Burden of the Miniſters Stipend; becauſe, as above laid down, Preſcription gives only an *exſtrinſick* Exception againſt the Purſuer claiming, but operates not an Extinction of the Right claimed. I have formerly thought that Teind is a Land-right; and therefore ſuffers not the negative Preſcription: But this is not juſt. Teinds are a *Burden* upon Land, juſt as an Infeftment of Annualrent is. And if the negative Preſcription ſhould take Place, the Conſequence would be a *Liberation* only, not a *Tranſference* of Property. Were a Right to Teinds to be conſidered not as a *jus unicum & individuum*, but a ſeparate *principal independent* Right as to every diſtinct Years Teind-duty, the Matter would be expedite. But this is not ſo, as is endeavoured to be made out above. And truly after all, ſince a Right to Teinds is acquirable by Preſcription, which ſuppoſes it a *jus unicum & individuum*, it appears a fair Conſequence, that it ſhould be loſt the ſame Way.

As to the negative Preſcription of Viccarage-teinds, there is a remarkable Deciſion obſerved by *Foun-*

Fountainhall, 24. *July* 1678, Laird of *Grant* contra *M'Intoſh*, where it is held, "That Viccarage of "Lint, Hemp, Milk, *&c.* does totally preſcribe "*non utendo* for forty Years; which holds true in "general with Reſpect to all Species, except Calves, "Lambs and Wool: And the Reaſon given for "the Exception is, becauſe theſe commonly pay "Viccarage in all Places; and therefore as to theſe "Ceſſation of Payment liberates only from all Years "above forty." The Author adds, "That the ſame "had been found before, Earl of *Panmuir* and the "Heritors of *Inverneſs*, as alſo the Parſon of *Preſ-"tonhaugh* and his Pariſhioners. And as to Roots, "it was then lately decided between *Gib* in *Sut-"ties-Myre* in *Aberdeen* and *Burnet*, where Roots "and Herbs were found not liable in Viccarage, "unleſs they had been in Uſe of paying the Teind "within theſe forty Years. And on the 30. *June* "1668, Miniſter of *Elgin* contra his Pariſhioners; "The Lords found, That Yards in *Elgin*, belong-"ing to the Canons of old, ſhould not pay Vic-"carige, becauſe free forty Years back, and paſt "all Memory, unleſs he would prove Payment "either out of thir, or any other the Canons Por-"tions within that Time to the Church." This Deciſion ſeems to introduce a Diſtinction amongſt the different Species, that pay Viccarage Teind, *ſciz. ordinary*, ſuch as Calves, Lambs and Wool, which preſcribe not; *extraordinary*, containing all the other Species, which do preſcribe. If this hold, it muſt be taken in a limited Senſe, what is laid down by Lord *Stair*, *Tit. Teinds*, § 7. *ſciz. That Viccarage-teinds are local, according to the Cuſtom of the Benefice or Pariſh.* And thus Subjects that *ordinarily* pay Viccarage are upon the ſame Foot-

ing with Parſonage-teinds, neither of them ſubject to the negative Preſcription.

Diſcharges and Liberations are not capable of the negative Preſcription, they relate not to the Conſtitution of a Right, but to the ultimate Concluſion and Performance thereof; they cannot therefore be loſt *non utendo*, becauſe not deſign'd to have any further Operation: Thus Decreets of Valuation and Sale of Teinds preſcribe not. *Fountainhall, Forbes*, 7th *June* 1710. Lady *Cardroſs* contra *Graham*, becauſe ſuch Decreets are not an *Eſtabliſhment* of a Right of Teinds, but a *Liberation* therefrom. And in mutual Declarators of Thirlage and Immunity, the one founding on an old Charter, the other on a poſterior Contract, giving Power to the Party whoſe Lands had been thirled by the Charter, to build a Mill on his own Ground, it was found, That tho' he had not built any for upwards of a 100 Years, yet this *Liberty* was not loſt by Preſcription. *Fountainhall, Forbes*, 14th *March* 1707, Laird *Newmains* contra Laird of *Bimerſide*.

As to Exceptions which are reckon'd perpetual according to the Brocard, *Temporanea ad agendum ſunt perpetua ad excipiendum*, the following Diſtinction will clear the Matter. If the Exception be founded upon ſome Right in the Defender's Perſon, it can laſt no longer than the Right ſubſiſts, but if founded upon *Diſcharges*, *Liberations* or ſuch like, it muſt be perpetual; thus the Exception of Payment can never preſcribe, becauſe it is a *Liberation*. But Compenſation does preſcribe with the Defender's Claim upon which it is founded; for there can be no Compenſation after the Debt is extinguiſhed by Payment or Preſcription. In this View, I cannot tell

tell if the Deciſion, *Forbes*, 24th *June* 1712, *Sinclair* contra *Murray*, be well founded. The Caſe was, in an Action of Count and Reckoning, the Defender proponed Compenſation upon two Receipts, in which the Purſuer acknowledged the Receipt of Money from the Defender, and obliged himſelf to allow the ſame at Counting. Replied for the Purſuer, The Receipts are preſcribed. It was anſwered, That Diſcharges or Receipts affording Ground of Defence only, and which the Receiver cannot found upon, till he be purſued, are *perpetua ad excipiendum*, and cannot preſcribe, which was found relevant.

Preſcription, tho' not an intrinſick or real Exception, is of that Sort of perſonal Exceptions, which are drawn from the Circumſtances of the Purſuer, denying him the *jus agendi*: For this Reaſon, it may not only be pled upon by the Debitor himſelf, who is liberate thereby, but by all others having Intereſt in the Queſtion. And thus in a Competition betwixt two Aſſignies to an Adjudication, the ſecond Aſſigny was allowed to propone Preſcription againſt the firſt Aſſigny, whereby his came to be the preferable Right. 26. *November* 1728. Mr. *Alexander Fraſer* contra *Hector Mackenzie*.

Of the poſitive Preſcription.

A habile Title ever preſumes *bona fides*, without examining into the Right of the Diſponer; providing only there be any Room for the Suppoſition, that the Subject poſſibly might have been his. Thus forty Years Poſſeſſion with a Title from a Subject was found ſufficient to eſtabliſh a Fair, tho'

the King alone can conſtitute Fairs; it being a poſſible Suppoſition, that the Right was originally derived from the King to the Diſponer. *Stair*, 2d *December* 1679, *Farquharſon* contra Earl of *Aboyn*. And a Biſhop's Charter diſpoſing of a Salmon-fiſhing with forty Years Poſſeſſion was ſuſtain'd as a good Right, notwithſtanding that Salmon-fiſhing is *inter regalia*; becauſe the Biſhop might have got a Grant from the King. *Stair*, 13*th January* 1680. *Brown* contra Town of *Kirkcudbright*.

By the *Roman* Law, the Author's Poſſeſſion acceded to that of the ſingular Succeſſor, to compleat *uſucapion*, providing the Author was in *bona fide*. See *Voet. H. T.* § 16. But in my Opinion, tho' to the poſitive Preſcription, a continued *bona fides* is neceſſary, yet there ought to be an Exception in the Caſe of a *bona fide* Purchaſer, who ſhould be allowed to reckon upon his Author's Poſſeſſion, tho' it be found afterward, that he has been *in mala fide*, and could not acquire to himſelf by Preſcription. The Reaſon is, that Dereliction is ſufficient to cut off the former Proprietor; and the preſent Poſſeſſor, who has bought *bona fide*, is in as favourable Situation as if his Author had been alſo a *bona fide* Poſſeſſor, and conſequently ought reaſonably to be prefer'd to the former Proprietor, and much more to the King or firſt Occupier.

As to the Title neceſſary in the poſitive Preſcription, found, That Saſines upon Haſp and Staple, having no other Warrant but the Clerk of the Burgh his Aſſertion, are not a ſufficient Title for Preſcription, as not contained in the Act of Parliament 1617, which mentions Saſines upon Retours, Charters and Precepts of *Clare-conſtat*, but no Word

Word of Haſp and Staple; ſo that Acts of Parliament being *ſtrictiſſimi juris* are not to be extended, and theſe being omitted, it muſt be preſumed to be *caſus de induſtria omiſſus*, and not *per incuriam*. *Fountainhall*, 10th *June* 1697. Adminiſtrators of *Heriot*'s Hoſpital contra *Hepburn*. Were this Law, there could be no ſuch Thing as Preſcription in Burgage Holdings. To be ſure this could never be the Intention of the Act. 'Tis true, corrective Laws are *ſtrictiſſimi juris*, and not to be extended. But the Subject of this Act is of another Nature. It has its Foundation in the original Laws as well as in the Laws of other Countries, and therefore reaſonably may be extended to all ſimilar Caſes, upon which Conſiderations the contrary was found, *Forbes*, 28*th November*, and 25*th December* 1705, *Ker* contra *Abernethy*. In other Caſes, a Saſine without a Warrant, not bearing to proceed upon a Retour or Precept of *Clare conſtat*, is no Title of Preſcription. *Stair*, 21ſt *January* 1679, *Fraſer* contra *Hog*. But a Procuratory of Reſignation with a Saſine relative thereto was found a ſufficient Title for Preſcription, tho' the Precept was wanting. *Fountainhall* 10*th June* 1697. Adminiſtrators of *Heriot*'s Hoſpital contra *Hepburn*. In the poſitive Preſcription founded upon the Poſſeſſion of Heirs, it is ſufficient to produce the naked Saſine without either the Precepts of *Clare-conſtat* or Retours upon which they are founded. *Stair*, *Gosford*, 15*th February* 1671, Earl of *Argyle* contra Laird *M'Naughton*. But at the ſame Time it was found, That the Saſine of an Heir who did not himſelf poſſeſs the whole Space of forty Years, never being renewed in his Succeſſors, who all of them continued to poſſeſs as apparent Heirs, was no ſufficient Title

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for Preſcription. *Stair*, ibid. *Fountainhall* 25th *June* 1680. Earl of *Queensberry* contra Earl of *Anandale*: But it appears to be without Controverſy, where the original Right itſelf is produced, that the bare Poſſeſſion of the Heir without Saſine is ſufficient, becauſe here the Right has been poſſeſſed upon, 40 Years, which is ſufficient for Preſcription.

Whether *Uſucapion* can proceed upon the Title *pro hærede*, is a celebrated Queſtion in the *Roman* Law, which the *Roman* Lawiers themſelves ſeem to have differed about, and is not at all cleared up by their Commentators. This Queſtion, becauſe of its very great Import in our Practice, muſt be conſidered at large. To begin, *Pomponius l.* 3. *pro hærede*, ſeems to lay down in general, That *Uſucapion* in this Caſe may proceed: His Words are, *Plerique putaverunt ſi hæres ſim & putem rem aliquam ex hæreditate eſſe, quæ non ſit: Poſſe me uſucapere.* Upon his Side are ranged, *l.* 4. *eod.* And *Julian. l.* 33. § 1. *de uſurp. & uſucap.*

On the other Hand, the famous *Papinian* declares himſelf expreſly, That there can be no ſuch Thing as an *Uſucapion pro hærede*, *l.* 11. *diverſ. temporal. preſcript. Cum hæres in jus omne defuncti ſuccedit, ignoratione ſua defuncti vitia non excludit: Veluti cum ſciens alienum illum, illo, vel precario poſſedit. Quamvis enim precarium hæredem ignorantem non teneat, nec interdicto recte conveniatur; tamen uſucapere non poterit, quod defunctus non potuit. Idem juris eſt cum de longa poſſeſſione quæritur: Neque enim recte defendetur, cum exordium ei bonæ fidei ratio non tueatur.* And there are who follow him, the Emperor *Antoninus*, *l.* 1. *C. Uſucap. pro hæred. Cum pro hærede uſucapio*

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locum non habeat, intelligis, neque matrem tuam, cui hæres extitiſti, neque te uſu mancipia ex ea cauſa capere poſſe. Diocleſian and *Maximian, l. ult. C. eod. Uſucapio non precedente vero titulo, procedere non poteſt: Nec prodeſſe neque tenenti, neque hæredi ejus poteſt: Nec obtentu velut ex hæreditate eſſet, quod alienum fuit, domini intentio ullo temporis longi ſpatio abſumitur.* And *Juſtinian*, § 12. *Inſtitut. Uſucap. Diutina poſſeſſio, quæ prodeſſe cœperat defuncto, & hærede; & bonorum poſſeſſori continuatur: Licet ipſe ſciat prædium alienum eſſe. Quod ſi ille initium juſtum non habuit: Hæredi bonorum poſſeſſori licet ignoranti, poſſeſſio non prodeſt. Quod noſtra conſtitutio ſimiliter & in uſucapionibus obſervari conſtituit, ut tempora continuentur.*

The Commentators, to reconcile theſe Texts, in Appearance ſo oppoſite, take a Method, but too frequent amongſt them. They recur to Diſtinctions; and if they can be ſo happy to make theſe Diſtinctions ſquare with the Words of the Text, they are very little ſolicitous about the *Spirit* and Meaning; and thus they cut the *Gordian* Knot, inſtead of looſing it. They rarely proceed to the Examination, whether their Diſtinctions are founded in Principles or in Reaſon; and yet this is the only Point worthy the canvaſſing. I am far from ſaying this is always the Caſe; it muſt be acknowledged we owe a great Deal to the Commentators, for the Lights they have afforded in clearing up the *Roman* Law; yet it cannot have eſcaped any intelligent Reader, that this Obſervation does not altogether want a Foundation; and the Example to be here given is a notable Inſtance of it.

To reconcile theſe Texts, the Doctors make this Diſtinction, *viz.* Whether the Defunct's Poſſeſſion

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was *vitious*, or *bona fide* by any lawful Title, ſuch as *commodatum*, *depoſitum*, *precario*, or ſuch like. They hold, that if the Defunct's Poſſeſſion was vitious, there can be no *uſucapio pro hærede*. But if *bona fide*, that is, if the Defunct poſſeſſed as *Colonus*, *Commodotarius*, &c. the Subject ſo poſſeſſed by the Defunct may be acquired abſolutely by the Heir, upon this Title *uſucapio pro hærede*. See *Vinnius ad dict.* § 12. *Inſtitut. de Uſucap*: *Voet ad pandect. T. pro hæred.* § 1. That this Diſtinction does by no Means agree with the Spirit and Meaning of the above-cited Texts, will appear almoſt upon the firſt Reflection; And that it is not founded in Principles, we ſhall endeavour to ſhow hereafter. Beſides, the Misfortune is in this Caſe, that it does not even agree with the Words. *Papinian* ſays expreſly in *dict. l.* 11. *Tamen uſucapere non poterit, quod defunctus non potuit.* Compare alſo *dict. l. ult. C. Uſucap. pro Hærede.*

In the midſt of ſo much Obſcurity, what Light ſhall we find. Among all the Authorities above-cited, *Papinian* is the ſingle Writer, who gives a Reaſon for his Opinion. Says he, There can be no *Uſucapio pro Hærede*, *quia hæres in jus omne defuncti ſuccedit, & ignoratione ſua defuncti vitia non excludit.* Which is, in other Words, That the Heir is the ſame Perſon with the Defunct; and therefore cannot be in a better Situation than him. This, I confeſs, I could never throughly comprehend; An Heir indeed is thus far the ſame Perſon with the Defunct, that he is liable for all his Debts, and ſucceeds in all his Rights. But it was never imagined, that an Heir is the ſame Perſon with the Defunct, with reſpect to any purely perſonal Quality or Property, good or bad. If the Defunct has committed a Crime, the Heir is not the

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ſame Perſon in any Senſe to be liable as the Criminal. If the Defunct was a Tutor, the Heir repreſents him *qua Debitor*, not *qua Tutor*. The ſame Way, if the Defunct was *in mala fide*, that is a perſonal Property, wherein the Heir repreſents him not; the Heir may well be ſuppoſed *in bona fide*, tho' the *mala fides* of his Predeceſſor be ever ſo certain; And this *Papinian* himſelf does allow in the Text, giving an Inſtance of it in the Caſe of *Precarium*.

Let us examine what Light we can have from Principles. It muſt be obvious from the Nature of Preſcription, that the Title, real or putative, to which the Poſſeſſor aſcribes his Poſſeſſion, muſt be in its Nature *abſolute* and *excluſive*. Thus the Title *pro emptore* is an abſolute excluſive Title; for this good Reaſon, that the ſame Subject cannot totally belong to two at once. There cannot be Preſcription againſt a Right, which is compatible and conſiſtent with the Right upon which the Preſcriber founds. Therefore a Right of a Wadſet, or of a Feu acquired by Preſcription, does no more *exclude* the Reverſer or Superior, than the Purchaſe of them does from the true Proprietor. To apply this, let us conſider if at all, or in what Caſes the Title *pro hærede* is an abſolute excluſive Title. At firſt View, it is plainly an abſolute and excluſive Title, as to all competing Heirs. If one Perſon be *ſole* Heir to the Defunct, which is always implied in a Service where but one is mentioned, no other Perſon can be Heir. Thus far then there may be an *uſucapio pro herede*. His *bona fides*, with the putative Title of being ſole Heir, will ſupport him in the Right, after having poſſeſſed during that Courſe of Time the Law requires. Let us next conſider how

this Title ſtands, with Reſpect to the Debts and Deeds of the Defunct. As to theſe it muſt be allowed, that it is far from being an *abſolute excluſive* Title. An Heir *qua* ſuch is liable to, and burdened with all the Debts and Deeds of the Perſon whom he repreſents: And therefore the Title *pro herede* is ſo far from being *excluſive* in this Caſe, that in Reality it implies this Burden, juſt as much as a Wadſet implies a Reverſion, or a Feu the Right of Superiority. This brings it to the ſame, as if the Debts and Deeds of the Predeceſſor were every one of them ſpecified in the Heir's Right. In this Caſe therefore the Heir can have no *bona fides*, no Security. The Debts and Deeds of his Predeceſſor he muſt ever lay his Account to anſwer.

If this hold, and upon a Review, I cannot find but it is ſolid, the Diſtinction above laid down by the Commentators muſt fall to the Ground as without any Foundation. If the Defunct's Poſſeſſion was as *Colonus* or *Commoditarius*, the Action *locati conducti*, or *Commodati* competent againſt him, muſt be good againſt his Heir for ever, until they fall by the negative Preſcription. 'Tis true the Heir may believe, that the Subject belonged to the Defunct in Property; but then it is not every vague Opinion any how taken up, that will found the *bona fides* neceſſary for Preſcription. It muſt be a ſolid Belief founded upon good Reaſon. An Heir can never have a ſolid *bona fides*, as to any Subject deſcending to him from the Defunct. For ought he knows, it may belong to another, no Body has told him otherwiſe; it may be given or promiſed away; it may be burdened with Debt. The very Title of Heir obliges him to ſubmit to all theſe Chances; which, as above laid down, effectually

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excludes that *Security*, that *bona fides*, which is abſolutely neceſſary in every Acquiſition by Preſcription. It muſt be obvious then, that this Diſtinction betwixt a *bona fide* and vitious Poſſeſſion, can ſignify nothing at all as to the Queſtion in Hand.

It being thus laid down, that *uſucapio pro hærede* is well founded where the Competition is among Heirs, but that it cannot obtain againſt the Debts and Deeds of the Predeceſſor, let us in the next Place, examine what the Texts above-cited ſay as to this Diſtinction. The *L.* 11. *diverſ. & temporal. Preſcript. L.* 1. *& ult. C. Uſucap. pro hæred. &* § 12. *Inſtitut. Uſucap.* relate all of them ſolely to the ſecond Branch of the Diſtinction. And the Authors have nothing in View but the Debts and Deeds of the Predeceſſor, in theſe Texts where they declare againſt the *uſucapio pro hærede*. The *L.* 33. § 1. cited upon the other Side of the Queſtion plainly relates to the firſt Branch of the Diſtinction. The Words are, *Hoc amplius, ſi juſtam cauſam habuerit exiſtimandi, ſe hæredem vel bonorum poſſeſſorem Domino extitiſſe fundum pro hærede poſſidebit.* The *L. ult. pro hæred.* may well be underſtood of the ſame Caſe: So there remains none that requires an Anſwer ſave *L.* 3. *pro hæred. Plerique putaverunt, ſi hæres ſim & putem rem aliquam ex hæreditate eſſe, quæ non ſit: poſſe me uſucapere.* This Text 'tis obvious can have little Weight either Way. It carries little more than an Inſinuation, that the Lawiers differed upon this Head. But if it be Matter of Conſcience with any one to have implicite Faith in every one of the *Roman* Lawiers, for a further Anſwer, let him conſult *Heineccius ad Pandectas T. pro hæred.* who under-

ſtands this Text of Caſes like the following, where, for Example, a foreign Sheep has fallen in with a Flock that is *in hereditate jacente*, which therefore may be acquired by the Heir poſſeſſing *pro hærede bona fide*. However, though it ſhould be allowed, that in this Caſe *Uſucapio* proceeds, the Explanation does not much ſatisfy me. *Pomponius* is there ſpeaking in general, and 'tis hard therefore to ſuppoſe that he meant only of a particular Caſe.

According to the Doctrine here laid down, there muſt be a great Difference with reſpect to the two Sorts of poſitive Preſcription eſtabliſhed in our Law, *viz.* that of Heirs, and that of original Purchaſers; the laſt gives Security againſt all Mortals; the other gives no Security againſt the Debts and Deeds of the Predeceſſor.

It remains only to be mentioned, that the *Uſucapio pro hærede*, ſo far as it relates to the Competition among Heirs, is eſtabliſhed in our Law by Act 1617, *Cap* 13. and a Time fixed much ſhorter than the ordinary Courſe of Preſcription: For it ſtatutes, That no Retour ſhall be reduceable after twenty Years. Sir *George Mackenzie* in his Obſervations upon this Act, gives his Opinion, That *this Preſcription of twenty Years militates only in Caſes of Competition betwixt the ſeveral Kinds of Heirs among themſelves; as, Whether the Heir of Line ſhould be preferred to the Heir of Taillie? But it does not exclude the clear Intereſt of Blood*; *for* jura ſanguinis nullo jure civili dirimi poſſunt, *L.* 8. *de Reg. Jur. And therefore an elder Brother was found to have good Intereſt to reduce a ſecond Brother's Retour*, 11*th* January 1673, Lamb *contra* Anderſon. This Obſervation does not appear to have any Foundation in the Act, which talks

talks in general of the righteous Heir, and neareſt of Kin; And thus it was found 11th *July* 1701, Lady *Edinglaſſie* contra Laird of *Powrie*, obſerved by *Fountainhall*, That "this Act does relate main-"ly to erroneous Services, where a remoter Heir is "retoured in Prejudice of a nearer; but that it does "not found Heirs ſerved to quarrel their own Re-"tours upon Minority and Leſion, or ſuch like; "ſeeing Minority and Leſion was a Ground of Re-"duction before that Act, and needed no new "Law." As for the Deciſion *Lamb* contra *Anderſon*, when it is looked into, it holds forth no ſuch Diſtinction. The Caſe there was, That a younger Brother had ſerved Heir while the elder was out of the Country: And the Diſpute turned ſolely upon this, the elder Brother having returned within the twenty Years, and dying ſoon after the Lapſe thereof, without intenting an actual Reduction of his Brother's Retour, whether the eldeſt Brother's Creditor, who had charged him to enter Heir within the twenty Years and adjudged, could have Acceſs to the Lands. Here it was not called into Controverſy, but that if the Heir had died abroad, without making any Motion againſt his Brother's Retour, the Retour would have ſtood good. It was only contended, That the Heir's Return with the Charge againſt him to enter, was equivalent to a Reduction of the Brother's Retour; which the Lords found. Sir *George* has a ſecond Obſervation upon this Act: His Words are, *By this Act, though ſuch Retours may be reduced in Prejudice of Perſons ſo ſerved; yet if the Perſons ſo ſerved have diſponed their Right to ſingular Succeſſors, having* bona fide *acquired Rights, as ſaid is, they cannot be prejudged. And in our Law*

this

this is ſtill introduced for the Good of Commerce in Favours of ſingular Succeſſors; for how ſhould they know, that the Retour was reducible? Were this Obſervation founded in the Act, it would give a Security to Purchaſers, and in my Opinion a reaſonable one, that our Law as yet is not acquainted with. It is no where held forth in general, That onerous Purchaſers are ſafe againſt all latent Claims; all of theſe they ſtand expoſed to, that from their Nature are good againſt ſingular Succeſſors, and this among others. Our Legiſlature has indeed rectified this in ſome Meaſure by ſeveral ſalutary Laws; among theſe the Act of Preſcription makes the greateſt Figure. It has further introduced Regiſters, and appointed ſeveral Kinds of Rights to be regiſtred under this Certification, that otherwiſe they ſhall not be good againſt ſingular Succeſſors. But there are many Rights ſtill behind, not appointed to be regiſtred, and many more that from their Nature cannot admit of it; of which this in Hand is an Example; all of theſe are good againſt Purchaſers. Let us examine what the Act ſays as to this. The Words are, *It is always declared, That theſe Preſents ſhall nowiſe be prejudicial to whatſoever Perſons who have acquired Rights of Lands and Heritages before the Date hereof* bona fide, *from Perſons already retoured thereto in any Time bygone: But the ſaid Perſons who have* bona fide *acquired, ſhall bruik their Rights* ACCORDING TO THE LAW THEN STANDING. The Meaning of this is extremely obvious. The Law referred to is *Parl.* 1494. *C.* 57. by which it was introduced, That Retours ſhould be unquarrellable after three Years, both with Reſpect to the Inqueſt, and the Perſon ſerved. This was altered by the preſent Act, ſo far as re-

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lates to the Perſon ſerved, who muſt now run a Courſe of twenty, Years Preſcription. This Alteration being made, it remained to be conſidered what ſhould become of thoſe who had purchaſed *bona fide* after three Years, from Perſons ſtanding infeft upon Retours, enjoying the Privileges of the former Law. The Reſolution upon this was obvious, that they muſt be ſecure, ſeeing the Perſons from whom they purchaſed were ſecure by the ſaid triennial Preſcription. Sir *George* in the above Citation underſtands this Clauſe as a Privilege introduced in general in Favours of ſingular Succeſſors, both who had acquired, and who ſhould acquire thereafter. There needs little other Argument againſt this, but the Clauſe itſelf upon which he founds his Obſervation, which in expreſs Terms reſtricts this Declaration to ſingular Succeſſors, who had purchaſed before the Date of this preſent Act. That Purchaſers from the Nature of the Thing are not ſecure againſt this Reduction, will be clear, 1*mo*, Becauſe this Reduction is not *perſonal* againſt the Defender, but *real* in the Subject. The righteous Heir coming up, claims the Subject as his own, and the Perſon retoured cannot ſtand in his Way, having no Right eſtabliſhed in the Subject till after the Courſe of the twenty Years Preſcription. In ſhort, it is not properly a Right *reducible*, but *null*, till it be *eſtabliſhed* by Preſcription, which is the common Nature of Rights to which the poſitive Preſcription is neceſſary: And therefore a Purchaſer from a Perſon erroneouſly retoured can be no more ſafe within the Years of Preſcription, than any one who purchaſes a *non Domino*. 2*do*, This is plainly the Opinion of the Legiſlature in the above-cited Clauſe, protecting the Purchaſers only from thoſe whoſe

whoſe Retours become irreduceable by Preſcription. 3*tio*, Were Purchaſers from Heirs abſolutely ſecure *a principio* againſt this Reduction, no good Reaſon could be given why this Reduction ſhould be limited to twenty Years, rather than the common Period of forty: Whereas upon the Suppoſition, that Purchaſers are not ſecure till after the Lapſe of twenty Years, there is an exceeding good Reaſon for it. One buys from an Heir, ſeeing a ſufficient good Progreſs for forty or fifty Years bygone. This gives him tolerable good Security, unleſs with Reſpect to this Reduction at the Inſtance of a nearer Heir. It would be hard in this Caſe to leave him open and inſecure for the Courſe of a ſecond forty Years. In a Word, a ſhorter Preſcription than twenty Years would be hard upon the righteous Heir; a longer would be hard upon Purchaſers.

Whether the King's annexed Property be *extra commercium*, ſo as not to be carried by Preſcription, is a Diſpute our Lawiers ſeem not perfectly agreed in. Sir *James Steuart* in Anſwer to *Dirleton*'s Doubts, *voce Preſcription*, thinks it cannot. Sir *George Mackenzie* in his Inſtitutions is of the ſame Mind: Yet this Author in his Obſervations upon the Act anent Preſcription, Obſervation 6. ſeems to be of a different Opinion: As alſo *Dirleton*, *voce Preſcription againſt the King*, who gives this remarkable Reaſon for it, That the poſitive Preſcription is introduced not ſo much *odio & negligentia non petentis*, as *favore poſſidentis*, which, ſays he, is the ſame with Relation to the King as to another. Lord *Stair* ſeems alſo to favour this Side of the Queſtion, holding, That this Act

runs

runs against the King as well as the Subject, without making any Diſtinction, § 25. *hujus tituli.* When we conſider the Act itſelf, there ſeems to be little Room for doubting, that the King's annexed Property may be carried by the poſitive Preſcription, ſtatuting, *That whoſo ſhall poſſeſs upon heritable Titles peaceably during the Space of forty Years, ſhall not be troubled purſued or inquieted by his Majeſty, or others, upon any Ground, Reaſon, or Argument, competent of Law, excepting Falſehood.* And as a ſtrong Fortification of this, it muſt be noticed, that in Act 12. *Parl* 1633, the Preſcriptability of annexed Property is directly taken for granted; yet after all, there is a Deciſion obſerved by *Fountainhall*, 19. *February* 1686, King's Advocate *contra* Laird of *Livingſtoun*, that looks as if our Lords were of Opinion, that the annexed Property is not preſcribable: It is to this Purpoſe, that a Right of Servitude, even upon the King's Property, may be acquired by Preſcription, it not being annexed Property. There is another Deciſion obſerved by Lord *Stair* that looks the ſame Way, 1. *February* 1671, *Fergusſon* contra Pariſhioners of *Kingarth.*

In our Practice, the poſitive Preſcription is extended to other Rights beſides Lands, which have Charter and Saſine for their Title. And ſo a Tack null, as being ſet without Conſent of the Patron, was found validated, and unquarrellable by forty Years Poſſeſſion. *Stair*, *Goſford*, 7. *July* 1677. Parſon of *Preſtounhaugh* contra his Pariſhioners. The like *Stair* 4 *February* 1681. *Robertſon* contra *Arbuthnot*. *Stair* 14. *July* 1675 College of *Aberdeen* contra Earl of *Northesk*. *Fountainhal* 27 *June*

1696. Earl *Leven* contra Pariſhoners of *Kennoway* and *Markinſh.* But as to this Matter, there is no ſmall Difficulty: Every Man is preſumed to know the Law; and therefore to know, that a Tack of Teinds, ſet without Conſent of the Patron, is not good: So that here there can be no Title, no *bona fides* for Preſcription. But poſſibly theſe Deciſions may be defended upon the Footing of the negative Preſcription, the Action of Reduction of the Tack being loſt *non utendo*: If it be not ſaid, That the Tacks were ſimply null, and needed no Reduction.

A Poſſeſſor cannot preſcribe contrary to the Terms of his own Right. For this would not only be a Preſcription without a Title or *bona fides*, but even directly contrary to both. Thus nothing can be acquired by Preſcription, without the Limits of a bounding Charter. Hence the Deciſion muſt be wrong recorded by *Hope, Tit. Fiſhing.* 18. *December* 1623. *Forbes* contra Lady *Monimusk.* Where a forty Years Poſſeſſion of Salmond Fiſhing, upon both Sides of the Water, was ſuſtained, tho' the Poſſeſſor was only inſeft in a Salmond Fiſhing, upon one Side of the Water.

Where the Title is general, whereby it is dubious whether the Subject be diſponed or not, the forty Years Poſſeſſion has two Effects. 1*mo.* It aſcertains the dubious Clauſe, and infers the Preſumption, that the Subject in Queſtion was intended to be diſponed, and to be comprehended under the general Clauſe. 2*do.* It beſtows the Property in Conſequence of that Title, where the Subject flowed *a non Domino.* Thus a Charter with a general Clauſe, *cum piſcationibus*, with forty Years Poſſeſſion, was ſuſtained

ſuſtained as to a Salmond Fiſhing. *Stair* 26. *January* 1665. Heritors of *Don* contra Town of *Aberdeen*. *Stair* 6. *December* 1678. *Brown* contra Town of *Kirkcudbright*. Here a general Clauſe, *cum piſcationibus*, is not commonly underſtood to carry Salmond Fiſhing, as being *inter regalia*; and therefore, unleſs the Poſſeſſion had explained the Clauſe, ſo as to comprehend Salmond Fiſhing, there could have been no Title for Preſcription. But a Charter of a Barony *cum piſcationibus*, needs no Poſſeſſion to explain the Clauſe; becauſe a Charter of a Barony is interpreted in the moſt extenſive Senſe; and therefore carries Salmond Fiſhing. So that, if the Diſponer be *Dominus*, the Diſponee's Right is good *a principio*. And in ſuch a Caſe, Preſcription can only be neceſſary, where the Right flowed *a non habente*. See *Stair*, *Gosford* 7. *February* 1672, *Fullarton* contra Earl of *Eglingtoun*. Compared with *Stair* 13. *January* 1680, *Brown* contra Town of *Kirkcudbright*. Upon the ſame Footing it was, that in a Reduction, at the King's Inſtance againſt the Heritors, adjacent to a Muir of his Majeſty's Patrimony, the Lords found, That not only the Heritors, whoſe Charters bore the ſaid Muir expreſly; but alſo even thoſe, who only carried the common Clauſe *cum communi paſtura*, had a Right of Servitude on it, if they could prove Preſcription, by forty Years Poſſeſſion. *Fountainhall* 18. *February* 1686. King's Advocate *contra* Heritors about *Drumſhorling* Muir.

'Tis upon this ſame Footing, that a forty Years Poſſeſſion, upon the dubious Title of *Part and Pertinent* infers Preſcription. Thus a Parcel of Ground was found to be acquired by Preſcription, in the Perſon of a ſingular Succeſſor, who had no other

Title thereto, ſave that of *Part and Pertinent*; and that tho' the Subject had formerly been a ſeparate Tenement *Stair* 17. *November* 1671. *Young* contra *Carmichael*. 20. *February* 1675. Counteſs of *Murray* contra *Weems*. And this was even found in Competition with one ſpecially infeft in the Subject. *Forbes* 22. *February* 1711. Earl of *Leven* contra *Finlay*. And forty Years Poſſeſſion of a Paſturage, upon the Title of *Part and Pertinent*, was found ſufficient, tho' a prior Tack of the Paſturage was produced, ſet by the Purſuer's Predeceſſors to the Defender's Predeceſſors, in vertue of which, it was alledged, the Poſſeſſion of the Paſturage began, which was not found ſufficient to take off the poſitive Preſcription. *Stair* 27. *November* 1677. *Grant* contra *Grant*. This Deciſion gives Riſe to the following Conſiderations. If the Poſſeſſion be of a Servitude, or ſuch as can come under the Clauſe of *Part and Pertinent*, the Preſumption is, that the Poſſeſſion has followed in vertue of that Title; but it muſt be noticed, that it goes no further, than a *Preſumption*, there being no Proof, that the Servitude poſſeſſed is truly *Part and Pertinent* of the Lands. If there were, the Defence of Preſcription would not be neceſſary. To overturn ſuch a *Preſumption* then, the Purſuer muſt have Acceſs to prove, that the Servitude was not poſſeſſed, as *Part and Pertinent*, but by Right derived from him, a Tack for Example. Of this there can be no Doubt, if the Tack was ſet within the forty Years. But now, let us ſuppoſe, That the Tack was ſet, and run out before the Beginning of the Preſcription, will not the Preſumption lie, that the Tackſman continued to poſſeſs *per tacitam relocationem*? Certainly; ſince he began to poſſeſs the Servitude, as a

diſtinct

diſtinct Subject, and not as *Part and Pertinent*. It is impoſſible thereafter, that by a bare Act of his Mind, he can forbear to poſſeſs as Tackſman, and reſolve for the future, to poſſeſs upon the Footing of Part and Pertinent: Nothing leſs would be neceſſary, than a new Grant from ſome third Party. Beſides it was never heard, That a *Reſolution* did ever found a Right, in order to Preſcription. Before he began to poſſeſs the Servitude, as Part and Pertinent, it is obvious, he could not have the leaſt Shadow of a Title to found him in a Preſcription; and of conſequence, that private Act of the Mind could not give him one. 'Tis a different Caſe, where the Tackſman ſells his Property Lands, and alſo the Subject ſet to him in Tack, as Part and Pertinent of the Lands; for in that Caſe the Purchaſer has a good Title to found him in a Preſcription. *Stair* 20. *February* 1675. Counteſs of *Murray* contra *Weems*.

A Perſon grants a Wadſet, who has no Title himſelf. The Wadſetter poſſeſſes forty Years, The Wadſetter's Right is ſecure by Preſcription. Is the Reverſer's Right alſo ſecure? I anſwer, No: Becauſe tho' the Wadſetter's Poſſeſſion be the Reverſer's Poſſeſſion, yet the Reverſer has no *bona fides*, no *titulus præſcribendi*. A habile Title may be founded on by the Receiver, in order to Preſcription, never by the Granter. Otherwiſe ſetting a Tack, *qua* Proprietor, might be founded upon by the Setter, as *titulus præſcribendi*. Yet in this Caſe, Preſcription was found to run in Favours of the Reverſer, as well as Wadſetter. *Forbes* 19. *June* 1713. *Murray* contra *Maclellan*.

Ser-

Servitudes are acquired by Preſcription, without any expreſs Title in Writing. Some of them by preſuming, from long Poſſeſſion, an antecedent Title, which not being neceſſary to be in Writing, at leaſt in any formal Way, the Writ, if any has been, may be readily ſuppoſed to have fallen by in that Time; and if there has been only verbal Conſent, it is plain, that after the Diſtance of forty Years, the Poſſeſſion muſt be the only Evidence thereof. Other Servitudes, ſuch as paying dry Multures, are upon a different Footing. There every Act of Exerciſe of the Servitude infers a preſent Conſent, if there has not been one antecedent; for it is rational enough to ſuppoſe, that a Man will pay dry Multures, in Subſerviency to another Man's Right already conſtituted, or in order to give a new Right: But the Suppoſition is quite abſurd, that a Man looking to his own Intereſt, and having no other View, but to act in his Right of Liberty, would go about to pay dry Multure.

To compleat Preſcription, it is ſufficient, that the Party poſſeſs naturally himſelf, or civilly by thoſe deriving Right from him. Thus the Liferenter's Poſſeſſion was found to be the Fiar's Poſſeſſion. *Newbyth* 28. *November* 1665. *Thomſon* contra *Young* and *Porteous*. For the Liferenter's Poſſeſſion was her Defunct Husband's Poſſeſſion, from whom it was derived; and the Defunct's Poſſeſſion was the Heir's Poſſeſſion. The ſame will obtain where a Right is diſponed to one in Liferent, and another in Fie; which is plain from this Conſideration, that the Poſſeſſion of the Author and ſingular Succeſſor are conjoined to make up Preſcription, when both poſſeſs upon the ſame Right.

Move-

Moveables differ from Lands, in the poſitive Preſcription, in this, That forty Years Poſſeſſion preſumes a Title: But ſtill it muſt be competent to the former Proprietor, to prove there was no Title; which he does, when he proves, that the Defender, or his Predeceſſors, ſtole the Thing, or that it was lent to them. In which View, the Deciſion, 7. *December* 1633. Miniſter and Seſſion of *Aberſcherder* contra Pariſhoners of *Gemrie*, obſerved by *Durie*, is not eaſie to be accounted for; where in a Purſuit for a Church Bell, lent by one Pariſh to another, the Defence, upon the poſitive Preſcription, was ſuſtained, by forty Years Poſſeſſion, without allowing the Purſuer to prove the Loan.

The ſeveral Caſes of non valens agere.

Preſcription, as has been laid down, being the Reſult of Neglect and Deſertion, it operates not where the Party can aſſign any juſt Cauſe of Forbearance. And therefore,

1*mo*. Preſcription runs only from the Term of Payment, not from the Date of the Bond: And therefore a Bond being payable to a Husband and Wife, and longeſt Liver, *&c.* Preſcription was not found to run againſt the Wife's Liferent-right of this Sum, till after her Husband's Death; becauſe before that Time ſhe had no Action nor Intereſt. *Stair*, *Dirleton*, *Gosford*, 22. *June* 1675. *Gaw* contra Earl of *Weems*. The like with reſpect to a Bond, payable after the Granter's Deceaſe. *Stair* 23. *June* 1675. *Bruce* contra *Bruce*. And in general Preſcription runs againſt no Right, till Action be once competent upon it; becauſe from that Period

riod only can Neglect or Derelict̃ion be dated. And yet by an expreſs Clauſe in the Act anent the ſeptennial Preſcription of cautionry Obligements, Preſcription runs from the Date, not from the Term of Payment; *maxime invita juriſprudentia. Fountainhall* 7. *December* 1707. *Gordon* contra *Cuming.*

2*do.* The moſt proper Caſe of *non valens agere*, is where the Perſon is barred, by an injuſt Forfeiture, from following out his Right. For there can be no Neglect, where there is no Liberty. *Stair* 25. *January* 1678. Duke of *Lauderdale* contra Earl of *Tweedale.* This was ſuſtained to a Party, who was Abroad in his Majeſty's Service, during the Uſurpation, and durſt not appear under Hazard of his Life; Tho' it was pled, That in this Caſe there being no Forfeiture, the Party might have appeared by a Procurator. Sir *Patrick Home January* 1682. *Whiteford* contra Earl of *Kilmarnock.*

3*tio*, In ſome Caſes it is laudable to forbear Action, as for Example, where a Woman in Decency forbears to purſue her Husband; and therefore during the Time ſhe is clad with a Husband, Preſcription runs not againſt her, forbearing to purſue for Implement of her Contract of Marriage *Stair, Gilmour, 5th July* 1665. *Macky* contra *Stuart.*

4*to*, Where the Circumſtances are ſuch, that he can have no Benefit by acting. As for Example, Where a Man having in his Perſon two Adjudications upon an Eſtate, continues to poſſeſs upon one of them for upwards of 40 Years, which is afterwards found redeemable. The other Adjudication in the mean Time will not ſuffer the negative Preſcription; becauſe he was not negligent in not perſuing upon it, having poſſeſſed the whole Eſtate by vertue

Vertue of the other Adjudication. And thus a Man is never put under a Neceſſity to act, when he can have no other View but to ſtop Preſcription. For Preſcription being a Conſequence of Neglect; if he was not negligent, which he is not, when he could have no Benefit by acting, the Preſcription cannot run. It was objected againſt a Defender pleading upon the poſitive Preſcription, that for ſome time during the forty Years, there was a Liferent of the Subject in Queſtion in the Perſon of one of the Defender's Authors, to which Liferent the Purſuer was Conſenter; and therefore during that Time he was *non valens agere*, in Reſpect by no Action could he obtain Poſſeſſion. And the Lords never put Parties to the Neceſſity of intenting Proceſſes where they can ſerve to no Purpoſe but to ſtop Preſcription, which was ſuſtained, *Stair. 28th February 1666.* Earl of *Lauderdale* contra Viſcount of *Oxenfoord.* *25th January 1678.* Duke *Lauderdale* contra Earl of *Tweedale.* *17th January 1672.* *Young* contra *Thomſon.* *5th February 1680,* *Brown* contra *Hepburn.* An apparent Heir in Poſſeſſion of an Eſtate by ſingular Titles, having thereafter purchaſed in an Appriſing, it was found, That the apparent Heirs Poſſeſſion did preſerve the ſaid Appriſing from the negative Preſcription. It being pled in the general, That where a Poſſeſſor has many Rights in his Perſon, all diſtinct Titles of Poſſeſſion; Preſcription cannot run againſt one of them ſo long as he keeps Poſſeſſion. For what can he demand upon any of theſe Titles but to have the Poſſeſſion; which if he already has, there can be no Occaſion for an Action. But afterwards upon a reclaiming Bill the Lords found no Neceſſity of determining this Point, having taken it up upon a ſeparate Foot-

ing. *26th November* 1728, Mr. *Alexander Frazer* contra *Hector M Kenzie*. The ſeptennial Preſcription being alledged againſt a cautionry Obligement, the Charger anſwered, That for a Part of the Time he had a Ground of Compenſation, and ſo was *non valens agere*; tho' that Ground was never propounded, and now was removed. This Anſwer was repelled. *Fountainhall, Forbes, 16th February* 1711, *Bourbon* contra *Montgomery*.

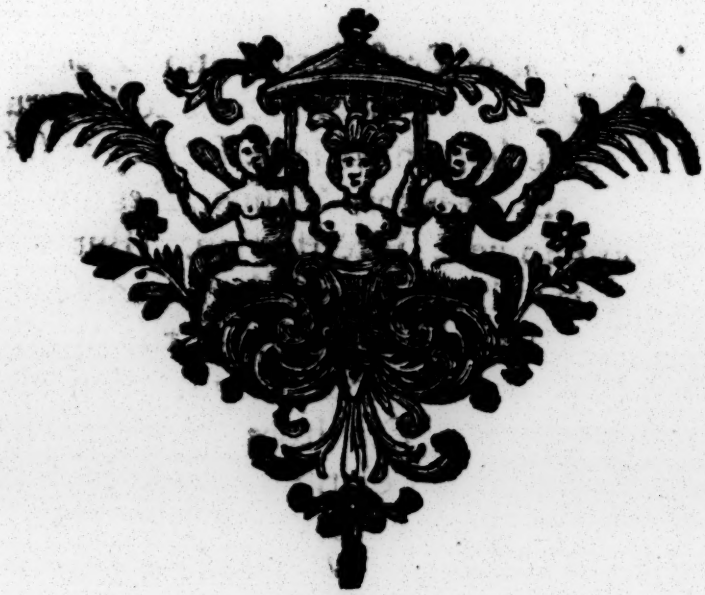
5*to*, No Man can preſcrive againſt himſelf. Of this take the following Example. The Eſtate of *Paiſley*, &c. ſtood veſted in the Perſon of Lord *Cochran*, tailied to himſelf and Heirs Male; after his Deceaſe his Grandfather the Earl of *Dundonald*, who had no Right in his own Perſon, granted a Diſpoſition of the ſame Eſtate to the Lord *Cochran*'s Son and his Heirs Male. One of whom above 40 Years thereafter altered the Deſtination, and conveyed the Subject to his Daughter. The Diſpoſition granted by the Earl of *Dundonald* being null as *a non habente poteſtatem*, the Eſtate in Conſequence was found to be all the while *in hereditate jacente* of the Lord *Cochran*, upon which the Heir Male, who had Acceſs to make up his Titles to the Lord *Cochran*, after the Deceaſe of him who conveyed the Subject, as ſaid is, to his Daughter, quarrelled the Conveyance as being a gratuitous Deed by an apparent Heir. And the forty Years poſitive Preſcription in Conſequence of the Earl of *Dundonald*'s Diſpoſition being pled in ſupport thereof; the Preſcription was not found to run, in Reſpect that no Man can preſcrive againſt himſelf. *Home, 26th January* 1726, Marquis of *Clydſdale* contra Earl of *Dundonald*. In this Caſe there were no *termini habiles* for Preſcription. Preſcription neceſſarily implies two Per-

Perſons, two oppoſite Intereſts; the one in a Courſe of acquiring either Property or Liberation; the other in a Courſe of Neglect, forbearing to follow out his Intereſt. Here there was but one Perſon, *ſciz.* the Heir Male; And no Man can be accuſed of Negligence for not following out an Action againſt himſelf. Beſides, no Ground of Action aroſe until the Diſpoſition was granted to the Daughter, and the Deſtination to Heirs Male thereby broke in upon. We have then three Foundations, each of which ſeparately is ſufficient to ſupport this Deciſion. 1*mo*, A Man cannot preſcribe againſt himſelf. 2*do*, No Benefit in purſuing. 3*tio*, No Action until the Time the Diſpoſition was granted to the Daughter.

As to Interruption of Preſcription, no Document taken upon the Debt, will be ſufficient to interrupt the negative Preſcription, unleſs it be ſuch as is ſufficient to interpel the Debitor. Thus, Regiſtration of a Bond is no ſufficient Interruption. But when this is examined, it will not be found to ſquare exactly with the Principles laid down anent the negative Preſcription. 'Tis obvious that Regiſtration alone is ſufficient to purge the Creditors Neglect: And when further Interpellation of the Debitor is found neceſſary, it can be with no other View, than to put an End to the *bona fide* Poſſeſſion of his Liberty. Now this indeed is reaſonable, as was hinted above, but as our Practice requires no *bona fides* in a Debitor, this Interpellation, in order to an Interruption of the negative Preſcription, ſeems not to be well founded in Principles; poſſibly it may be held, that the Regiſtration of a Bond without going on to interpel the Debitor for the Space of forty Years, in-

fers a Presumption of some original Vitiosity in the Bond, which barred the Creditor from bringing it ooner to Light. And it may be said, that Interpellation of the Debitor within the forty Years is a necessary Step to take off this Presumption. Whatever be in this, 'tis plain it cannot be universal: For to put the Case where the Debitor acknowledges upon Oath that the Debt is just; there simple Registration ought to be deemed sufficient to interrupt the negative Prescription.

FINIS.



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